Repeal of these provisions of parts 900 and 922 also will be consistent with the goal of the Vice President's National Performance Review to reduce the total number of regulations of executive agencies. *See* Report of the National Performance Review 32–33 (Sept. 17, 1993); E.O. 12861, 58 FR 48255 (Sept. 11, 1993).

For the foregoing reasons, the Board has decided to repeal § 922.6(a) and (c) and § 922.7, and to amend § 922.6(b) and § 900.51 of its regulations, pursuant to its general rulemaking authority under section 2B(a)(1) of the Bank Act. *See* 12 U.S.C. 1422b(a)(1).

III. Notice and Public Participation

Publication of notice of proposed rulemaking is not required by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, because the Board, for good cause, finds that the notice and comment procedure is unnecessary and contrary to the public interest in this instance. *See id.* § 553(b)(3)(B). Compliance with the public notice and comment procedure requirement of APA section 553 is unnecessary because the final rule makes only minor changes to the disclosure requirements imposed on appointed Board Directors, repeals provisions of the Board's regulations that have no effect on the public, and eliminates unnecessarily burdensome and duplicative regulations.

IV. Effective Date

For the reasons stated in part III of the Supplementary Information, the Board finds that, under APA section 553(d)(3), there is good cause for the final rule to become effective upon publication.

V. Regulatory Flexibility Act

The Board is adopting the changes to parts 900 and 922 in the form of a final rule and not as a proposed rule. Therefore, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, do not apply. *See id.* §§ 601(2), 603(a).

List of Subjects

12 CFR Part 900

Organizations and functions (Government agencies).

12 CFR Part 922

Conflict of interests.

Accordingly, Chapter IX, Title 12, parts 900 and 922, Code of Federal Regulations, are hereby amended as follows:

PART 900—DESCRIPTION OF ORGANIZATION AND FUNCTIONS

1. The authority citation for part 900 is revised to read as follows:

Authority: 5 U.S.C. 552; 12 U.S.C. 1422b(a).

2. Section 900.51 is revised to read as follows:

§ 900.51 Forms.

The following forms are available at the Finance Board headquarters facility (see § 900.3) and shall be used for the purpose indicated:

Form

10–91—Monthly Survey of Rates and Terms on Conventional 1 Family Nonfarm Mortgage Loans.
9102—Certificate of Nomination, Election of Federal Home Loan Bank Directors.
9103—Election Ballot, Election of Federal Home Loan Bank Directors.
A–1—Appointive Director Candidates—Personal Certification and Disclosure Form.
A–2—Appointive Directors—Personal Certification and Disclosure Form.
E–1—Elective Director Nominees—Personal Certification and Disclosure Form.
E–2—Elective Directors—Personal Certification and Disclosure Form.
90–T04—Local Travel Claim.

PART 922—BOARD OF DIRECTORS AND EMPLOYEES RESPONSIBILITIES AND CONDUCT

1. The authority citation for part 922 continues to read as follows:

Authority: 12 U.S.C. 1422a, 1422b.

2. Section 922.6 is revised to read as follows:

§ 922.6 Duty to report.

If an appointed Board director knows or suspects at any time that he or she does not meet any of the requirements for appointment set forth in sections 2A(b)(1)(B) and 2A(b)(2)(C) of the Act or this part, the appointed Board director shall report the specific factual basis for the known or suspected noncompliance in writing to the Board's designated agency ethics official within 30 days of the date noncompliance did or may have occurred.

§ 922.7 [Removed]

3. Section 922.7 is removed.

Dated: September 14, 1995.

By the Federal Housing Finance Board.

Bruce A. Morrison,

Chairman.

[FR Doc. 95–23391 Filed 9–21–95; 8:45 am]

BILLING CODE 6725–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 602

[TD 8619]

RIN 1545–AR01

Direct Rollovers and 20-Percent Withholding Upon Eligible Rollover Distributions From Qualified Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations relating to eligible rollover distributions from tax-qualified retirement plans and section 403(b) annuities. These regulations reflect the changes made by the Unemployment Compensation Amendments of 1992 and affect the administrators, sponsors, payors of, and participants in tax-qualified retirement plans and section 403(b) annuities.

EFFECTIVE DATE: These regulations are effective on October 19, 1995.

FOR FURTHER INFORMATION CONTACT: Thomas Foley, (202) 622–6050 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1341. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The estimated annual burden per plan administrator/payor/recordkeeper varies from .05 hour to 330 hours, depending on individual circumstances, with an estimated average of .50 hour.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, PC:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books and records relating to this collection of information must be

retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On October 22, 1992, Temporary Income Tax Regulations (TD 8443) under sections 401(a)(31), 402(c), 402(f), 403(b), and 3405(c) of the Internal Revenue Code (Code) were published in the Federal Register (57 FR 48163). A notice of proposed rulemaking (EE–43–92) cross-referencing the temporary regulations was published in the Federal Register (57 FR 48194) on the same day. The temporary regulations provide guidance for complying with the Unemployment Compensation Amendments of 1992 (UCA). In addition, Notice 92–48 (1992–2 C.B. 381), provides a safe harbor explanation that can be used in order to satisfy section 402(f) of the Code. Written comments were received on the proposed and temporary regulations and a public hearing on the proposed and temporary regulations was held on January 15, 1993.

In response to initial comments on the proposed and temporary regulations, the IRS provided additional guidance under UCA in Notice 93–3 (1993–1 C.B. 293), and Notice 93–26 (1993–1 C.B. 308). The notices solicited public comments concerning the additional guidance.

After consideration of all the comments, the temporary regulations are replaced and the proposed regulations under sections 401(a)(31), 402(c), 402(f), 403(b), and 3405(c) are adopted as revised by this Treasury decision.

Explanation of Provisions

1. Overview

UCA significantly changed the treatment of distributions from qualified plans and section 403(b) annuities. First, under section 402(c), as amended by UCA, all distributions from qualified plans to an employee (or to the employee's spouse after the employee's death) from the ''balance to the credit'' of the employee are ''eligible rollover distributions'' to the extent includible in gross income, except (1) substantially equal periodic payments over life or life expectancy or for a period of ten years or more, and (2) required minimum distributions under section 401(a)(9).

Second, UCA added a new qualification provision under section 401(a)(31) that requires qualified plans to provide employees with a direct rollover option. Under a direct rollover option, an employee may elect to have an eligible rollover distribution paid directly to an individual retirement account or individual retirement annuity, or to another qualified plan that accepts rollovers (collectively referred to as eligible retirement plans). The direct rollover option is provided in addition to the pre-existing rollover provisions under section 402. Thus, an employee who receives an eligible rollover distribution but who does not elect a direct rollover still has the option to subsequently roll over the distribution to an eligible retirement plan within 60 days of receipt.

Third, UCA amended section 3405 to impose mandatory 20-percent income tax withholding on any eligible rollover distribution that the employee does not elect to have paid in a direct rollover. This withholding applies even if the employee receives a distribution and then rolls it over within the 60-day period. (However, where employer securities are distributed, a special rule limits withholding to the value of cash and other property received in the distribution.) To the extent that a distribution is both includible in gross income and not an eligible rollover distribution, the elective withholding rules under section 3405 and § 35.3405–1 continue to apply.

Finally, section 402(f), as amended by UCA, requires that, within a reasonable period of time before making a distribution, the plan administrator give a written explanation (the section 402(f) notice) to the employee of: (1) The availability of the direct rollover option; (2) the rules that require income tax withholding on distributions; (3) the rules under which the employee may roll over the distribution within 60 days of receipt; and, (4) if applicable, the other special tax rules (e.g., five-year averaging) that may apply to the distribution.

Similar rules are provided for section 403(b) annuities. However, a distribution from a section 403(b) annuity may only be rolled over to another section 403(b) annuity or individual retirement plan and not to a qualified plan.

UCA requirements generally apply to distributions from qualified plans and section 403(b) annuities that are made on or after January 1, 1993. (A special delayed effective date applies to certain section 403(b) annuities sponsored by state or local governments.)

In general, comments received on the proposed and temporary regulations were favorable. Thus, the final regulations retain the general structure and substance of the proposed and temporary regulations.

2. Notice 93–3 and Notice 93–26

As discussed above, in response to initial comments on the proposed and temporary regulations, additional guidance under UCA was provided by Notice 93–3, 1993–1 C.B. 293, and Notice 93–26, 1993–1 C.B. 308. The major issues addressed in these notices include the following:

- A distribution that occurs when a participant's accrued benefit is offset by the amount of a plan loan is an eligible rollover distribution if it otherwise qualifies as such. However, the plan need not offer a direct rollover of the offset distribution. For purposes of determining the amount that must be withheld, the offset distribution is treated in the same manner as a distribution of employer securities.
- In determining whether a distribution is a required minimum distribution for purposes of section 402(c), any distribution prior to the year an employee attains (or would have attained) age 70½ is not treated as a required minimum distribution and any annuity distribution paid from a defined benefit plan or an annuity contract in that year or a subsequent year is treated as a required minimum distribution.
- A participant may affirmatively elect to make an immediate direct rollover or receive an immediate payment, provided that the participant has been informed of the right to take at least 30 days, after receiving the appropriate notices, to make this decision.
- Amounts paid under an annuity contract distributed by a qualified plan are payments of the balance to the credit in the qualified plan for purposes of section 402(c) and, thus, are subject to the same UCA rules as distributions from qualified plans (e.g., permitting direct rollover and requiring 20-percent withholding).

The commentary on Notices 93–3 and 93–26 was favorable. Accordingly, the guidance contained in the notices has been incorporated into these final regulations. In addition, certain other revisions have been made to the regulations in response to comments, to clarify certain issues, and to facilitate administration and compliance. The most significant of these revisions are discussed below.

3. Section 402(f) and Other Participant Notices

a. Timing of Notice

As discussed above, the Code requires that the plan administrator provide the section 402(f) notice within a reasonable period of time prior to making an eligible rollover distribution. The

temporary regulations provide that this reasonable time period is the same period required for obtaining consent to a distribution under section 411(a)(11). The regulations under section 411(a)(11) provide that a participant's consent to a distribution is not valid unless the participant receives a notice of his or her rights under the plan, including the right to defer the distribution, no more than 90 days and no less than 30 days prior to the annuity starting date.

The 90/30-day time period was adopted in the temporary regulations under section 402(f) because the IRS and Treasury believed that it was appropriate for the section 402(f) notice to be provided within the same time period in which plan administrators are required to provide other distribution information. In response to initial comments, the IRS and Treasury issued Notice 93–26, which modified the 30-day time period to allow a participant to affirmatively elect to make an immediate direct rollover or receive an immediate payment, but did not change the 90-day time period for either section 402(f) or section 411(a)(11). As discussed above, the final regulations are modified in a manner consistent with the additional guidance provided in Notice 93–26.

Commentators requested an expansion of the 90-day time period. More broadly, commentators asked that the requirements of sections 411(a)(11), 417, and 402(f) be addressed in the context of new technologies that use electronic media, such as telephone or computer systems, to automate plan administrative functions that traditionally have been processed manually by use of paper-based systems (e.g., notices to participants and participant distribution requests). For example, some commentators suggested that plans be permitted to provide an annual written notice if a summary of the notice is provided through these new technologies. In addition, commentators asked that the modification to the 30-day rule permitting immediate payment after an affirmative election, announced in Notice 93–26, be applied to distributions subject to section 401(a)(11) and 417.

The IRS and Treasury continue to believe that the section 402(f) notice (as well as the section 411(a)(11) and section 417 notices) should be provided close to the time participants are considering the distribution to which the notice applies. Therefore, no change to the 90-day rule is made in these final regulations.

Although no additional guidance on the use of electronic media is provided in these final regulations, the IRS and Treasury will continue to consider modifications of the notice and consent requirements that might be appropriate to accommodate new technologies, if adequate safeguards are provided. The IRS and Treasury continue to invite comments on this issue. These final regulations specifically delegate authority to the Commissioner to modify or provide additional guidance in the Internal Revenue Bulletin with respect to the notice requirements of section 402(f). A parallel delegation of authority is provided in the proposed and temporary regulations under sections 411(a)(11) and 417 which are being published in connection with these final regulations.

The proposed and temporary regulations under section 411(a)(11) are modified in a manner consistent with the changes to the 30-day rule described in Notice 93–26. The proposed and temporary regulations under section 417 modify the timing requirement with respect to the notice required by that section. Under this modification, if a participant affirmatively elects a distribution (whether a qualified joint and survivor annuity or an optional form of benefit), the plan may permit the distribution to commence at any time more than seven days after the section 417 notice is given, provided that the distributee has the right to revoke the election until the later of the annuity starting date or the expiration of the seven-day period that begins the day after the section 417 notice is provided.

b. Posting of Notice

In response to questions from commentators, the final regulations clarify that section 402(f) notices must be provided directly to each distributee rather than by posting at the place of employment.

c. Additions to Model Notice

Notice 92–48, 1992–2 C.B. 381, contains the model section 402(f) notice that serves as a ''Safe Harbor Explanation'' for purposes of complying with section 402(f). The IRS is considering developing additional model language to address specific subjects not addressed in the current model notice, including withholding on employer securities, treatment of plan loan offset amounts (including withholding and the timing and availability of a right to roll over), and the $5,000 death benefit exclusion. Until this additional language is published, plan administrators may continue to satisfy section 402(f) by providing the current model notice, even if issues not addressed in the current notice (such as those listed in the preceding sentence) are relevant to the distributee. Plan administrators are encouraged, however, to supplement the model notice with language addressing these issues when applicable to a distributee. The IRS and Treasury invite comments or suggestions concerning possible additions or modifications to the notice.

4. Definition of Eligible Rollover Distribution

As noted above, under section 402(c) and section 403(b), as amended by UCA, all distributions from qualified plans and section 403(b) annuities to an employee (or to the employee's spouse after the employee's death) of any portion of the ''balance to the credit'' of the employee are ''eligible rollover distributions'' to the extent includible in gross income, except (1) substantially equal periodic payments over life or life expectancy or for a period of ten years or more, and (2) required minimum distributions under section 401(a)(9).

a. Benefits Included in the Balance to the Credit

Based on the broad statutory definition of an eligible rollover distribution and the UCA legislative history, the final regulations provide that generally all plan benefits are included in the ''balance to the credit'' of an employee, including ancillary benefits not protected by section 411(d)(6). Therefore, the final regulations do not adopt commentators' suggestions to exclude various items from the definition, such as qualified disability benefits, hardship distributions, and distributions that are includible in gross income but that are made to a distributee reasonably expected to have no income tax liability.

b. Substantially Equal Periodic Payments From a Defined Contribution Plan

The final regulations retain the rule that the principles of section 72(t) apply for purposes of determining whether distributions constitute a series of substantially equal periodic payments. The preamble to the temporary regulations provides that, in determining whether payments in a series are substantially equal for purposes of section 402(c)(4), the principles of Notice 89–25, 1989–1 C.B. 662, are applicable. Notice 89–25 provides guidance for determining whether distributions from a separate account are substantially equal for purposes of section 72(t). Commentators requested guidance on applying the three methods in Notice 89–25 for

determining whether payments are substantially equal over life or life expectancy to payments for a period other than life or life expectancy. In response to these comments, the final regulations provide that payments from a qualified defined contribution plan that are calculated on a declining balance of years will be considered substantially equal. In addition, if a distribution from a defined contribution plan consists of payments of a fixed amount each year until the account balance is exhausted, reasonable actuarial assumptions must be used to determine the period of years over which the payments will be made.

c. Disregard of Contingencies

The final regulations retain the rule that the determination of whether payments are substantially equal for a given period is made when payments commence, without regard to contingencies or modifications that have not yet occurred. Recovery from a disability is added to the final regulations as an example of a contingency that is disregarded until it occurs. In addition, although not addressed in the regulations, it should be noted that a mere change in the type (as opposed to the amount) of benefit being paid in a series of payments is not relevant in determining whether the payments are substantially equal and are being paid for a period described in section 402(c)(4)(A). Thus, if a distributee receives a series of disability benefits followed by a series of retirement benefits, and the two benefits are reasonably expected to be substantially equal, the retirement benefits may be combined with the disability benefits in determining whether a series of payments are substantially equal and are for a period described in section 402(c)(4)(A).

In response to comments, the final regulations also clarify that a mere change in distributee upon the death of an employee is not a modification that requires a redetermination of whether the remaining payments under the annuity are substantially equal periodic payments over a period described in section 402(c)(4)(A) and, thus, excluded from the definition of eligible rollover distribution.

d. Coordination With Social Security Benefits

The final regulations expand the scope of the rule in the temporary regulations permitting social security benefits to be taken into account in determining whether a series of periodic payments are substantially equal. Under the final regulations, if the amount paid annually from the plan is reduced upon attainment of social security retirement age (or commencement of social security benefits), the payments after the reduction will be treated as substantially equal to the payments prior to the reduction, even if the reduction is not equal to the distributee's annual social security benefits, provided that the reduction does not exceed the annual social security benefits and the post-reduction payments are substantially equal.

e. Supplements and Adjustments to Annuity Payments

The final regulations retain the rule that a payment will be treated as independent, and thus as not part of a series of substantially equal periodic payments, if the payment is substantially larger or smaller than the other payments in the series. However, in response to comments, the final regulations clarify that adjustments to the amount of annuity payments that result solely from correction of reasonable administrative error or delay in payment will not cause any payment in a series of payments that are otherwise substantially equal to fail to be treated as a payment in the series.

Further, in response to comments concerning the payment of ''13th checks'' and other supplemental annuity payments, the regulations provide an additional rule for defined benefit plans. If a defined benefit plan provides a benefit increase for annuitants (e.g., retirees or beneficiaries) that supplements a series of substantially equal annuity payments in a consistent manner for all similarly situated annuitants, the benefit increase will not constitute an independent payment (and will not cause the series of payments to be treated as not substantially equal), if the payment either is not more than 10 percent of the annual rate of payment or is not more than $750.

f. Required Minimum Distributions

As noted above, the final regulations incorporate the guidance in Notice 93–3 concerning the determination of the required minimum distribution for purposes of section 402(c). Also, in response to questions concerning the allocation of basis in the case of a required minimum distribution, the final regulations clarify that if part (but not all) of a payment is required under section 401(a)(9) and if part (but not all) of the same payment represents return of basis, the plan must first allocate the return of basis toward satisfaction of the section 401(a)(9) required minimum distribution. This rule has the effect of maximizing the amount that is eligible to be rolled over.

g. Corrective Distributions and Deemed Distributions

The final regulations retain the rule that certain corrective distributions and deemed distributions are excluded from the definition of an eligible rollover distribution. The regulations also clarify that, to the extent corrective distributions are properly made from a section 403(b) annuity, they are not eligible rollover distributions.

With respect to deemed distributions under section 72(p), the final regulations include the clarifications provided in Notice 93–3 with respect to the distinction between plan loan offset amounts and deemed distributions under section 72(p), except for the portion of Example 6 from Notice 93–3 that addressed issues relating to the tax treatment of a distribution that occurs after a deemed distribution. This portion of the example generated numerous questions and comments concerning the proper interpretation of section 72(p). Those questions and comments are best addressed in the context of guidance under section 72(p) rather than section 402(c). No inference should be drawn from the deletion of a portion of the example.

h. $5,000 Death Benefit Exclusions

The final regulations clarify that, to the extent that a death benefit is a distribution from a qualified plan, the portion of the distribution that is excluded from gross income under section 101(b) is not an eligible rollover distribution. However, recognizing that a surviving spouse or former spouse may be entitled to more than one death benefit that might qualify for the death benefit exclusion, the final regulations permit the plan administrator of a qualified plan to assume, for purposes of section 401(a)(31) and section 3405, that any death benefit being distributed from the plan to the surviving spouse or former spouse of an employee that qualifies for the exclusion is the only benefit that so qualifies.

5. Direct Rollover Requirement

a. Procedures for Accomplishing a Direct Rollover

The final regulations under section 401(a)(31) retain the rules that permit the employer to accomplish an employee's direct rollover by any reasonable means of delivery to an eligible retirement plan, including delivery of a check to the eligible retirement plan by the employee (provided that the payee line of the

check is made out in a manner that will ensure that the check is negotiable solely by the trustee or custodian of the recipient plan). The preamble to the temporary regulations requested comments on whether a standard notation, such as ''Direct Rollover,'' should be required to appear on the face of any check provided to an employee for delivery. The comments received were divided, and the final regulations do not require any standard notation.

b. Procedures That Substantially Impair the Availability of Direct Rollover

The temporary regulations provide that it would not be reasonable, and thus would not satisfy section 401(a)(31), for a plan administrator to require information or documentation or to establish procedures that ''effectively eliminate'' the right to take a direct rollover. The final regulations broaden this language to include procedures that ''substantially impair'' the right to take a direct rollover, and provide additional examples illustrating violations of section 401(a)(31).

c. Qualification Protection for Recipient Plans

The temporary regulations do not address qualification protection for qualified plans accepting rollovers. Comments were received asking for criteria that, if satisfied, would permit a receiving plan to assume that the plan from which it is accepting a rollover is qualified. To encourage plans to accept rollovers, these final regulations provide a safe harbor for receiving plans that reasonably determine that the distributing plan is qualified. The regulations also provide an example of a reasonable determination in this respect. The example illustrates that a reasonable determination will have been made if, prior to accepting a rollover contribution, the receiving plan obtains a plan administrator's letter indicating that the distributing plan had a favorable determination letter regarding qualification. However, if the receiving plan later obtains actual knowledge that the distributing plan was not qualified at the time of the direct rollover, corrective distributions with respect to the rollover amount would be required.

In addition, the final regulations under section 3405 retain the rule that no withholding liability will be imposed on a plan administrator that reasonably relies on ''adequate information'' provided by the distributee. Commentators asked whether this ''adequate information'' protection under section 3405 could also be extended to section 401(a)(31). Specifically, they asked if the distributing plan is protected from being treated as violating section 401(a)(31) where the distributee purports to elect a direct rollover but the distribution made in accordance with the information provided by the distributee does not in fact result in a direct rollover. The IRS and Treasury do not believe any special relief is needed in this case because there is no violation of section 401(a)(31) if the plan follows the distributee's directions after providing a direct rollover option.

d. Direct Rollovers to Qualified Defined Benefit Plans

The definition of eligible retirement plan under section 402(c) includes all qualified trusts (defined contribution plans and defined benefit plans) as well as qualified annuity plans under section 403(a) and individual retirement plans. For purposes of section 401(a)(31), section 401(a)(31)(D) provides that the only qualified trusts that are treated as eligible retirement plans are defined contribution plans. Commentators asked whether a plan may permit direct rollovers to qualified defined benefit plans. The final regulations clarify that the limitation in section 401(a)(31)(D) applies only for purposes of determining the scope of the requirement under section 401(a)(31), while the definition of eligible retirement plan in section 402(c)(8)(B) controls the types of plans to which direct rollovers are permitted. Thus, under section 401(a)(31), a plan is required to offer a direct rollover to any defined contribution plan, and is permitted (but not required) to offer a direct rollover to a qualified trust that is a defined benefit plan. In addition, the final regulations clarify that an eligible rollover distribution that is paid in a direct rollover to a defined benefit plan is not subject to withholding.

e. Default Procedures

The final regulations retain the rules permitting a plan administrator to establish a procedure for a participant who fails to make any election. However, the regulations clarify that if a default procedure is implemented, the distributee must receive an explanation of the procedure in conjunction with the section 402(f) notice.

f. Valuation of Distributed Property

Some commentators raised concerns about the valuation of property in order to determine the portion of the distribution eligible for direct rollover or subject to withholding. The IRS and Treasury recognize the difficulties in satisfying the rollover, withholding, and reporting requirements where property is involved and invite comments regarding these issues, including suggested approaches for addressing the valuation and taxation of property distributed by qualified plans. While these regulations include no changes with respect to these issues, they continue to permit use of the rules provided in Q&A F–1 and Q&A F–3 of § 35.3405–1 for purposes of withholding.

g. Plan Amendments

The final regulations retain the rule that, although plans must comply in operation with section 401(a)(31) beginning January 1, 1993, plans need not be amended to comply with section 401(a)(31) until the end of the remedial amendment period for amending the plan to comply with the amendments to section 401(a) made by the Tax Reform Act of 1986 (TRA '86). Notice 92–36 (1992–2 C.B. 364), specifies the remedial amendment period for most employers. Announcement 95–48 (1995–23 IRB 11), dated June 5, 1995, extends this period for plans maintained by tax exempt organizations and governments.

Plans may continue to use the model amendment published in Rev. Proc. 93–12 (1993–1 C.B. 479), to comply in form with section 401(a)(31) and these final regulations. For plans that have received favorable determination letters, see the relevant guidance for the timing of plan amendments, e.g., section 21.04 of Rev. Proc. 95–6 (1995–1 I.R.B. 166).

6. Other Rollover Rules

a. Rollover Elections Are Irrevocable

The final regulations incorporate the rule in § 1.402(a)(5)–1T that, in order for a contribution of an eligible rollover distribution to an individual retirement plan to qualify for exclusion from gross income as a rollover contribution, the participant must irrevocably elect to treat the contribution as a rollover contribution at the time the contribution is made to the individual retirement plan. A direct rollover election is deemed to be such an irrevocable election.

b. 60-Day Rule

The final regulations clarify that the 60-day period for a distributee to roll over a distribution commences on the date of that distribution regardless of the number of distributions during the taxable year. Because section 402, as amended by UCA, no longer requires that the distribution constitute a specified portion of the balance to the credit of the employee in order to be eligible for rollover, there is no longer

any need for the prior administrative rule under which the 60-day period began as of the date of the last distribution during the taxable year.

c. Rollover From Plan Not Counted in One-Year-Look-Back Rule

The final regulations clarify that a rollover (whether or not it is a direct rollover) from a qualified plan is not treated as a rollover contribution for purposes of the one-year-look-back rule in section 408(d)(3)(B).

7. 20-Percent Mandatory Withholding

a. Additional Withholding

In response to comments, the regulations clarify that a plan administrator or payor may (but is not required to) permit a distributee to elect to have more than 20 percent withheld from an eligible rollover distribution.

b. Limitation of Withholding to Cash and Property Distributed

Section 3405(e)(8) limits the maximum amount that may be withheld on any designated distribution to the sum of the amount of money and the fair market value of property (other than employer securities) that is received in the distribution. Commentators asked whether 20-percent withholding applies if the portion of the distribution that is a designated distribution is allocated to employer stock and paid to the employee, while the portion of the distribution that is the return of basis is allocated to cash. The final regulations clarify that the section 3405(e)(8) provision limiting withholding to the sum of cash and property (other than employer securities) applies to the total distribution (including, for example, return of basis) and not just to the designated distribution.

Effective Date

These final regulations apply to distributions made on or after October 19, 1995. The text of these regulations replaces the temporary regulations published in the Federal Register on October 22, 1992. Although they will be removed from the Code of Federal Regulations (CFR), the temporary regulations, as they appear in the April 1, 1995 edition of 26 CFR part 1, retain their effectiveness with respect to distributions made on or after January 1, 1993, but before October 19, 1995. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, plans may comply with the provisions of UCA by substituting all or part of the provisions of these final regulations for the corresponding provisions of the temporary regulations, if any.

In addition, no penalties or sanctions will apply for failure to satisfy section 401(a)(31) or section 402(f), or for failure to withhold in accordance with section 3405(c), if the requirements of UCA are satisfied with respect to a distribution, made on or after October 19, 1995 but before January 1, 1996, by substituting all or part of the provisions of the temporary regulations for the corresponding provisions of these final regulations. For any distribution made on or after October 19, 1995 but before January 1, 1996, a distributee may roll over the distribution if it qualifies as an eligible rollover distribution if all or part of the provisions of the temporary regulations are substituted for the corresponding provisions of these final regulations. Moreover, during this period, the plan administrator and the employee (or spousal distributee) need not apply the provisions in the same manner with respect to any distribution.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Marjorie Hoffman, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the Service and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 602

Reporting and recordkeeping requirements.

Accordingly, 26 CFR parts 1, 31, and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805. * * *

§§ 1.401(a)(31)–1T, 1.402(c)–2T, 1.402(f)–2T, and 1.403(b)–2T [Removed]

Par. 2. Sections 1.401(a)(31)–1T, 1.402(c)–2T, 1.402(f)–2T, and 1.403(b)–2T are removed.

Par. 3. Sections 1.401(a)(31)–1, 1.402(c)–2, and 1.403(b)–2 are added and § 1.402(f)–1 is revised to read as follows:

§ 1.401(a)(31)–1 Requirement to offer direct rollover of eligible rollover distributions; questions and answers.

The following questions and answers relate to the qualification requirement imposed by section 401(a)(31) of the Internal Revenue Code of 1986, pertaining to the direct rollover option for eligible rollover distributions from pension, profit-sharing, and stock bonus plans. Section 401(a)(31) was added by section 522(a) of the Unemployment Compensation Amendments of 1992, Public Law 102–318, 106 Stat. 290 (UCA). For additional UCA guidance under sections 402(c), 402(f), 403(b)(8) and (10), and 3405(c), see §§ 1.402(c)–2, 1.402(f)–1, and 1.403(b)–2, and § 31.3405(c)–1 of this chapter, respectively.

List of Questions

make a direct rollover within a certain time period?

Q–8: May the plan administrator establish a deadline after which the distributee may not revoke an election to make or not make a direct rollover?

Q–9: Must the plan administrator permit a distributee to elect to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

Q–10: Must the plan administrator allow a distributee to divide an eligible rollover distribution into two or more separate distributions to be paid in direct rollovers to two or more eligible retirement plans?

Q–11: Will a plan satisfy section 401(a)(31) if the plan administrator does not permit a distributee to elect a direct rollover if his or her eligible rollover distributions during a year are reasonably expected to total less than $200?

Q–12: Is a plan administrator permitted to treat a distributee's election to make or not make a direct rollover with respect to one payment in a series of periodic payments as applying to all subsequent payments in the series?

Q–13: Is the eligible retirement plan designated by a distributee to receive a direct rollover distribution required to accept the distribution?

Q–14: For purposes of applying the plan qualification requirements of section 401(a), is an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover a distribution and rollover or is it a transfer of assets and liabilities?

Q–15: Must a direct rollover option be provided for an eligible rollover distribution that is in the form of a plan loan offset amount?

Q–16: Must a direct rollover option be provided for an eligible rollover distribution from a qualified plan distributed annuity contract?

Q–17: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution?

Q–18: When must a qualified plan be amended to comply with section 401(a)(31)?

Questions and Answers

Q–1: What are the direct rollover requirements under section 401(a)(31)?

A–1: (a) *General rule.* To satisfy section 401(a)(31), added by UCA, a plan must provide that if the distributee of any eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan, and specifies the eligible retirement plan to which the distribution is to be paid, then the distribution will be paid to that eligible retirement plan in a direct rollover described in Q&A–3 of this section. Thus, the plan must give the distributee the option of having his or her distribution paid in a direct rollover to an eligible retirement plan specified by the distributee. For purposes of section 401(a)(31) and this section, eligible rollover distribution has the meaning set forth in section 402(c)(4) and § 1.402(c)–2, Q&A–3 through Q&A–10 and Q&A–14, except as otherwise provided in Q&A–2 of this section, eligible retirement plan has the meaning set forth in section 402(c)(8)(B) and § 1.402(c)–2, Q&A–2.

(b) *Related Internal Revenue Code provisions*—(1) *Mandatory withholding.* If a distributee of an eligible rollover distribution does not elect to have the eligible rollover distribution paid directly from the plan to an eligible retirement plan in a direct rollover under section 401(a)(31), the eligible rollover distribution is subject to 20-percent income tax withholding under section 3405(c). See § 31.3405(c)–1 of this chapter for guidance concerning the withholding requirements applicable to eligible rollover distributions.

(2) *Notice requirement.* Section 402(f) requires the plan administrator of a qualified plan to provide, within a reasonable period of time before making an eligible rollover distribution, a written explanation to the distributee of the distributee's right to elect a direct rollover and the withholding consequences of not making that election. The explanation also is required to provide certain other relevant information relating to the taxation of distributions. See § 1.402(f)–1 for guidance concerning the written explanation required under section 402(f).

(3) *Section 403(b) annuities.* Section 403(b)(10) provides that requirements similar to those imposed by section 401(a)(31) apply to annuities described in section 403(b). See § 1.403(b)–2 for guidance concerning the direct rollover requirements for distributions from annuities described in section 403(b).

(c) *Effective date*—(1) *Statutory effective date.* Section 401(a)(31) applies to eligible rollover distributions made on or after January 1, 1993.

(2) *Regulatory effective date.* This section applies to eligible rollover distributions made on or after October 19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, § 1.401(a)(31)–1T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, a plan may satisfy section 401(a)(31) by substituting any or all provisions of this section for the corresponding provisions of § 1.401(a)(31)–1T, if any.

Q–2: Does section 401(a)(31) require that a qualified plan permit a direct rollover to be made to a qualified trust that is not part of a defined contribution plan?

A–2: No. Section 401(a)(31)(D) limits the types of qualified trusts that are treated as eligible retirement plans to defined contribution plans that accept eligible rollover distributions. Therefore, although a plan is permitted, at a participant's election, to make a direct rollover to any type of eligible retirement plan, as defined in section 402(c)(8)(B) (including a defined benefit plan), a plan will not fail to satisfy section 401(a)(31) solely because the plan will not permit a direct rollover to a qualified trust that is part of a defined benefit plan. In contrast, if a distributee elects a direct rollover of an eligible rollover distribution to an annuity plan described in section 403(a), that distribution must be paid to the annuity plan, even if the recipient annuity plan is a defined benefit plan.

Q–3: What is a direct rollover that satisfies section 401(a)(31), and how is it accomplished?

A–3: A direct rollover that satisfies section 401(a)(31) is an eligible rollover distribution that is paid directly to an eligible retirement plan for the benefit of the distributee. A direct rollover may be accomplished by any reasonable means of direct payment to an eligible retirement plan. Reasonable means of direct payment include, for example, a wire transfer or the mailing of a check to the eligible retirement plan. If payment is made by check, the check must be negotiable only by the trustee of the eligible retirement plan. If the payment is made by wire transfer, the wire transfer must be directed only to the trustee of the eligible retirement plan. In the case of an eligible retirement plan that does not have a trustee (such as a custodial individual retirement account or an individual retirement annuity), the custodian of the plan or issuer of the contract under the plan, as appropriate, should be substituted for the trustee for purposes of this Q&A–3, and Q&A–4 of this section.

Q–4: Is providing a distributee with a check for delivery to an eligible retirement plan a reasonable means of accomplishing a direct rollover?

A–4: Providing the distributee with a check and instructing the distributee to deliver the check to the eligible retirement plan is a reasonable means of direct payment, provided that the check is made payable as follows: [Name of the trustee] as trustee of [name of the eligible retirement plan]. For example, if the name of the eligible retirement plan is ''Individual Retirement Account of John Q. Smith,'' and the name of the trustee is ''ABC Bank,'' the payee line of a check would read ''ABC Bank as trustee of Individual Retirement

Account of John Q. Smith.'' Unless the name of the distributee is included in the name of the eligible retirement plan, the check also must indicate that it is for the benefit of the distributee. If the eligible retirement plan is not an individual retirement account or an individual retirement annuity, the payee line of the check need not identify the trustee by name. For example, the payee line of a check for the benefit of distributee Jane Doe might read, ''Trustee of XYZ Corporation Savings Plan FBO Jane Doe.''

Q–5: Is an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover currently includible in gross income or subject to 20-percent withholding?

A–5: No. An eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is not currently includible in the distributee's gross income under section 402(c) and is exempt from the 20-percent withholding imposed under section 3405(c)(2). However, when any portion of the eligible rollover distribution is subsequently distributed from the eligible retirement plan, that portion will be includible in gross income to the extent required under section 402, 403, or 408.

Q–6: What procedures may a plan administrator prescribe for electing a direct rollover, and what information may the plan administrator require a distributee to provide when electing a direct rollover?

A–6: (a) *Permissible procedures.* Except as otherwise provided in paragraph (b) of this Q&A–6, the plan administrator may prescribe any procedure for a distributee to elect a direct rollover under section 401(a)(31), provided that the procedure is reasonable. The procedure may include any reasonable requirement for information or documentation from the distributee in addition to the items of adequate information specified in § 31.3405(c)–1(b), Q&A–7 of this chapter. For example, it would be reasonable for the plan administrator to require that the distributee provide a statement from the designated recipient plan that the plan will accept the direct rollover for the benefit of the distributee and that the recipient plan is, or is intended to be, an individual retirement account, an individual retirement annuity, a qualified annuity plan described in section 403(a), or a qualified trust described in section 401(a), as applicable. In the case of a designated recipient plan that is a qualified trust, it also would be reasonable for the plan administrator to require a statement that the qualified trust is not excepted from the definition of an eligible retirement plan by section 401(a)(31)(D) (i.e., is not a defined benefit plan).

(b) *Impermissible procedures.* A plan will fail to satisfy section 401(a)(31) if the plan administrator prescribes any unreasonable procedure, or requires information or documentation, that effectively eliminates or substantially impairs the distributee's ability to elect a direct rollover. For example, it would effectively eliminate or substantially impair the distributee's ability to elect a direct rollover if the recipient plan required the distributee to obtain an opinion of counsel stating that the eligible retirement plan receiving the rollover is a qualified plan or individual retirement account. Similarly, it would effectively eliminate or substantially impair the distributee's ability to elect a direct rollover if the distributing plan required a letter from the recipient eligible retirement plan stating that, upon request by the distributing plan, the recipient plan will automatically return any direct rollover amount that the distributing plan advises the recipient plan was paid incorrectly. It would also effectively eliminate or substantially impair the distributee's ability to elect a direct rollover if the distributing plan required, as a condition for making a direct rollover, a letter from the recipient eligible retirement plan indemnifying the distributing plan for any liability arising from the distribution.

Q–7: May the plan administrator treat a distributee as having made an election under a default procedure where the distributee does not affirmatively elect to make or not make a direct rollover within a certain time period?

A–7: Yes, the plan administrator may establish a default procedure whereby any distributee who fails to make an affirmative election is treated as having either made or not made a direct rollover election. However, the plan administrator may not make a distribution under any default procedure unless the distributee has received an explanation of the default procedure and an explanation of the direct rollover option as required under section 402(f) and § 1.402(f)–1, Q&A–1 and unless the timing requirements described in § 1.402(f)–1, Q&A–2 and Q&A–3 have been satisfied with respect to the explanations of both the default procedure and the direct rollover option.

Q–8: May the plan administrator establish a deadline after which the distributee may not revoke an election to make or not make a direct rollover?

A–8: Yes, but the plan administrator is not permitted to prescribe any deadline or time period with respect to revocation of a direct rollover election that is more restrictive for the distributee than that which otherwise applies under the plan to revocation of the form of distribution elected by the distributee.

Q–9: Must the plan administrator permit a distributee to elect to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

A–9: Yes, the plan administrator must permit a distributee to elect to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder paid to the distributee. However, the plan administrator is permitted to require that, if the distributee elects to have only a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover, that portion be equal to at least a specified minimum amount, provided the specified minimum amount is less than or equal to $500 or any greater amount as prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(*b*) of this chapter. If the entire amount of the eligible rollover distribution is less than or equal to the specified minimum amount, the plan administrator need not allow the distributee to divide the distribution.

Q–10: Must the plan administrator allow a distributee to divide an eligible rollover distribution into two or more separate distributions to be paid in direct rollovers to two or more eligible retirement plans?

A–10: No. The plan administrator is not required (but is permitted) to allow the distributee to divide an eligible rollover distribution into separate distributions to be paid to two or more eligible retirement plans in direct rollovers. Thus, the plan administrator may require that the distributee select a single eligible retirement plan to which the eligible rollover distribution (or portion thereof) will be distributed in a direct rollover.

Q–11: Will a plan satisfy section 401(a)(31) if the plan administrator does not permit a distributee to elect a direct rollover if his or her eligible rollover distributions during a year are reasonably expected to total less than $200?

A–11: Yes. A plan will satisfy section 401(a)(31) even though the plan

administrator does not permit any distributee to elect a direct rollover with respect to eligible rollover distributions during a year that are reasonably expected to total less than $200 or any lower minimum amount specified by the plan administrator. The rules described in § 31.3405(c)–1, Q&A–14 of this chapter (relating to whether withholding under section 3405(c) is required for an eligible rollover distribution that is less than $200) also apply for purposes of determining whether a direct rollover election under section 401(a)(31) must be provided for an eligible rollover distribution that is less than $200 or the lower specified amount.

Q–12: Is a plan administrator permitted to treat a distributee's election to make or not make a direct rollover with respect to one payment in a series of periodic payments as applying to all subsequent payments in the series?

A–12: (a) Yes. A plan administrator is permitted to treat a distributee's election to make or not make a direct rollover with respect to one payment in a series of periodic payments as applying to all subsequent payments in the series, provided that:

(1) The employee is permitted at any time to change, with respect to subsequent payments, a previous election to make or not make a direct rollover; and

(2) The written explanation provided under section 402(f) explains that the election to make or not make a direct rollover will apply to all future payments unless the employee subsequently changes the election.

(b) See § 1.402(f)–1, Q&A–3 for further guidance concerning the rules for providing section 402(f) notices when eligible rollover distributions are made in a series of periodic payments.

Q–13: Is the eligible retirement plan designated by a distributee to receive a direct rollover distribution required to accept the distribution?

A–13: (a) *General rule.* No. Although section 401(a)(31) requires qualified plans to provide distributees the option to make a direct rollover of their eligible rollover distributions to an eligible retirement plan, it imposes no requirement that any eligible retirement plan accept rollovers. Thus, a plan can refuse to accept rollovers. Alternatively, a plan can limit the circumstances under which it will accept rollovers. For example, a plan can limit the types of plans from which it will accept a rollover or limit the types of assets it will accept in a rollover (such as accepting only cash or its equivalent).

(b) *Qualification of receiving plan.* A plan that accepts a direct rollover from another plan will not fail to satisfy section 401(a) merely because the plan making the distribution is, in fact, not qualified under section 401(a) or section 403(a) at the time of the distribution, if, prior to accepting the rollover, the receiving plan reasonably concluded that the distributing plan was qualified under section 401(a) or section 403(a). For example, the receiving plan may reasonably conclude that the distributing plan was qualified under section 401(a) or section 403(a) if, prior to accepting the rollover, the plan administrator of the distributing plan provided the receiving plan with a statement that the distributing plan had received a determination letter from the Commissioner indicating that the plan was qualified.

Q–14: For purposes of applying the plan qualification requirements of section 401(a), is an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover a distribution and rollover or is it a transfer of assets and liabilities?

A–14: For purposes of applying the plan qualification requirements of section 401(a), a direct rollover is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. For example, if the consent requirements under section 411(a)(11) or sections 401(a)(11) and 417(a)(2) apply to the distribution, they must be satisfied before the eligible rollover distribution may be distributed in a direct rollover. Similarly, the direct rollover is not a transfer of assets and liabilities that must satisfy the requirements of section 414(l). Finally, a direct rollover is not a transfer of benefits for purposes of applying the requirements under section 411(d)(6), as described in § 1.411(d)–4, Q&A–3. Therefore, for example, the eligible retirement plan is not required to provide, with respect to amounts paid to it in a direct rollover, the same optional forms of benefits that were provided under the plan that made the direct rollover. The direct rollover requirements of section 401(a)(31) do not affect the ability of a qualified plan to make an elective or nonelective transfer of assets and liabilities to another qualified plan in accordance with applicable law (such as section 414(l)).

Q–15: Must a direct rollover option be provided for an eligible rollover distribution that is in the form of a plan loan offset amount?

A–15: A plan will not fail to satisfy section 401(a)(31) merely because the plan does not permit a distributee to elect a direct rollover of an eligible rollover distribution in the form of a plan loan offset amount. Section 1.402(c)–2(b), Q&A–9 defines a plan loan offset amount, in general, as a distribution that occurs when, under the terms governing a plan loan, the participant's accrued benefit is reduced (offset) in order to repay the loan. A plan administrator is permitted to allow a direct rollover of a participant note for a plan loan to a qualified trust described in section 401(a) or a qualified annuity plan described in section 403(a). See § 1.402(c)–2, Q&A–9 for examples illustrating the rules for plan loan offset amounts that are set forth in this Q&A–15. See § 31.3405(c)–1, Q&A–11 of this chapter for guidance concerning special withholding rules that apply to a distribution in the form of a plan loan offset amount.

Q–16: Must a direct rollover option be provided for an eligible rollover distribution from a qualified plan distributed annuity contract?

A–16: Yes. If any amount to be distributed under a qualified plan distributed annuity contract is an eligible rollover distribution (in accordance with § 1.402(c)–2), Q&A–10 the annuity contract must satisfy section 401(a)(31) in the same manner as a qualified plan under section 401(a). Section 1.402(c)–2, Q&A–10 defines a qualified plan distributed annuity contract as an annuity contract purchased for a participant, and distributed to the participant, by a qualified plan. In the case of a qualified plan distributed annuity contract, the payor under the contract is treated as the plan administrator. See § 31.3405(c)–1, Q&A–13 of this chapter concerning the application of mandatory 20-percent withholding requirements to distributions from a qualified plan distributed annuity contract.

Q–17: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution?

A–17: (a) *General rule.* For purposes of section 401(a)(31), a plan administrator may make the assumptions described in paragraphs (b) and (c) of this Q&A–17 in determining the amount of a distribution that is an eligible rollover distribution for which a direct rollover option must be provided. Section 31.3405(c)–1, Q&A–10 of this chapter provides assumptions for purposes of complying with section 3405(c). See § 1.402(c)–2, Q&A–15 concerning the effect of these assumptions for purposes of section 402(c).

(b) *$5,000 death benefit.* A plan administrator is permitted to assume that a distribution from the plan that

qualifies for the $5,000 death benefit exclusion under section 101(b) is the only death benefit being paid with respect to a deceased employee that qualifies for that exclusion. Thus, to the extent that such a distribution would be excludible from gross income based on this assumption, the plan administrator is permitted to assume that it is not an eligible rollover distribution.

(c) *Determination of designated beneficiary.* For the purpose of determining the amount of the minimum distribution required to satisfy section 401(a)(9)(A) for any calendar year, the plan administrator is permitted to assume that there is no designated beneficiary.

Q–18: When must a qualified plan be amended to comply with section 401(a)(31)?

A–18: Even though section 401(a)(31) applies to distributions from qualified plans made on or after January 1, 1993, a qualified plan is not required to be amended before the last day by which amendments must be made to comply with the Tax Reform Act of 1986 and related provisions, as permitted in other administrative guidance of general applicability, provided that:

(a) In the interim period between January 1, 1993, and the date on which the plan is amended, the plan is operated in accordance with the requirements of section 401(a)(31); and

(b) The amendment applies retroactively to January 1, 1993.

§ 1.402(c)–2 Eligible rollover distributions; questions and answers.

The following questions and answers relate to the rollover rules under section 402(c) of the Internal Revenue Code of 1986, as added by sections 521 and 522 of the Unemployment Compensation Amendments of 1992, Public Law 102–318, 106 Stat. 290 (UCA). For additional UCA guidance under sections 401(a)(31), 402(f), 403(b)(8) and (10), and 3405(c), see §§ 1.401(a)(31)–1, 1.402(f)–1, and 1.403(b)–2, and § 31.3405(c)–1 of this chapter, respectively.

List of Questions

Questions and Answers

Q–1: What is the rule regarding distributions that may be rolled over to an eligible retirement plan?

A–1: (a) *General rule.* Under section 402(c), as added by UCA, any portion of a distribution from a qualified plan that is an eligible rollover distribution described in section 402(c)(4) may be rolled over to an eligible retirement plan described in section 402(c)(8)(B). For purposes of section 402(c) and this section, a rollover is either a direct rollover as described in § 1.401(a)(31)–1, Q&A–3 or a contribution of an eligible rollover distribution to an eligible retirement plan that satisfies the time period requirement in section 402(c)(3) and Q&A–11 of this section and the designation requirement described in Q&A–13 of this section. See Q&A–2 of this section for the definition of an eligible retirement plan and a qualified plan.

(b) *Related Internal Revenue Code provisions*—(1) *Direct rollover option.* Section 401(a)(31), added by UCA, requires qualified plans to provide a distributee of an eligible rollover distribution the option to elect to have the distribution paid directly to an eligible retirement plan in a direct rollover. See § 1.401(a)(31)–1 for further guidance concerning this direct rollover option.

(2) *Notice requirement.* Section 402(f) requires the plan administrator of a qualified plan to provide, within a reasonable time before making an eligible rollover distribution, a written explanation to the distributee of the distributee's right to elect a direct rollover and the withholding consequences of not making that election. The explanation also is required to provide certain other relevant information relating to the taxation of distributions. See § 1.402(f)–1 for guidance concerning the written explanation required under section 402(f).

(3) *Mandatory income tax withholding.* If a distributee of an eligible rollover distribution does not elect to have the eligible rollover distribution paid directly from the plan to an eligible retirement plan in a direct rollover under section 401(a)(31), the eligible rollover distribution is subject to 20-percent income tax withholding under section 3405(c). See § 31.3405(c)–1 of this chapter for provisions relating to the withholding requirements applicable to eligible rollover distributions.

(4) *Section 403(b) annuities.* See § 1.403(b)–2 for guidance concerning the direct rollover requirements for distributions from annuities described in section 403(b).

(c) *Effective date*—(1) *Statutory effective date.* Section 402(c), added by UCA, applies to eligible rollover distributions made on or after January 1, 1993, even if the event giving rise to the distribution occurred on or before January 1, 1993 (e.g. termination of the employee's employment with the employer maintaining the plan before January 1, 1993), and even if the eligible rollover distribution is part of a series of payments that began before January 1, 1993.

(2) *Regulatory effective date.* This section applies to any distribution made on or after October 19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, § 1.402(c)–2T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, any

or all of the provisions of this section may be substituted for the corresponding provisions of § 1.402(c)–2T, if any.

Q–2: What is an *eligible retirement plan* and a *qualified plan*?

A–2: An eligible retirement plan, under section 402(c)(8)(B), means a qualified plan or an individual retirement plan. For purposes of section 402(c) and this section, a qualified plan is an employees' trust described in section 401(a) which is exempt from tax under section 501(a) or an annuity plan described in section 403(a). An individual retirement plan is an individual retirement account described in section 408(a) or an individual retirement annuity (other than an endowment contract) described in section 408(b).

Q–3: What is an *eligible rollover distribution*?

A–3: (a) *General rule.* Unless specifically excluded, an eligible rollover distribution means any distribution to an employee (or to a spousal distributee described in Q&A–12(a) of this section) of all or any portion of the balance to the credit of the employee in a qualified plan. Thus, except as specifically provided in Q&A–4(b) of this section, any amount distributed to an employee (or such a spousal distributee) from a qualified plan is an eligible rollover distribution, regardless of whether it is a distribution of a benefit that is protected under section 411(d)(6).

(b) *Exceptions.* An eligible rollover distribution does not include the following:

(1) Any distribution that is one of a series of substantially equal periodic payments made (not less frequently than annually) over any one of the following periods—

(i) The life of the employee (or the joint lives of the employee and the employee's designated beneficiary);

(ii) The life expectancy of the employee (or the joint life and last survivor expectancy of the employee and the employee's designated beneficiary); or

(iii) A specified period of ten years or more;

(2) Any distribution to the extent the distribution is a required minimum distribution under section 401(a)(9); or

(3) The portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net unrealized appreciation described in section 402(e)(4)). Thus, for example, an eligible rollover distribution does not include the portion of any distribution that is excludible from gross income under section 72 as a return of the employee's investment in the contract (e.g., a return of the employee's after-tax contributions), but does include net unrealized appreciation.

Q–4: Are there other amounts that are not eligible rollover distributions?

A–4: Yes. The following amounts are not eligible rollover distributions:

(a) Elective deferrals, as defined in section 402(g)(3), that, pursuant to § 1.415–6(b)(6)(iv), are returned as a result of the application of the section 415 limitations, together with the income allocable to these corrective distributions.

(b) Corrective distributions of excess deferrals as described in § 1.402(g)–1(e)(3), together with the income allocable to these corrective distributions.

(c) Corrective distributions of excess contributions under a qualified cash or deferred arrangement described in § 1.401(k)–1(f)(4) and excess aggregate contributions described in § 1.401(m)–1(e)(3), together with the income allocable to these distributions.

(d) Loans that are treated as deemed distributions pursuant to section 72(p).

(e) Dividends paid on employer securities as described in section 404(k).

(f) The costs of life insurance coverage (P.S. 58 costs).

(g) Similar items designated by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(*b*) of this chapter.

Q–5: For purposes of determining whether a distribution is an eligible rollover distribution, how is it determined whether a series of payments is a series of substantially equal periodic payments over a period specified in section 402(c)(4)(A)?

A–5: (a) *General rule.* Generally, whether a series of payments is a series of substantially equal periodic payments over a specified period is determined at the time payments begin, and by following the principles of section 72(t)(2)(A)(iv), without regard to contingencies or modifications that have not yet occurred. Thus, for example, a joint and 50-percent survivor annuity will be treated as a series of substantially equal payments at the time payments commence, as will a joint and survivor annuity that provides for increased payments to the employee if the employee's beneficiary dies before the employee. Similarly, for purposes of determining if a disability benefit payment is part of a series of substantially equal payments for a period described in section 402(c)(4)(A), any contingency under which payments cease upon recovery from the disability may be disregarded.

(b) *Certain supplements disregarded.* For purposes of determining whether a distribution is one of a series of payments that are substantially equal, social security supplements described in section 411(a)(9) are disregarded. For example, if a distributee receives a life annuity of $500 per month, plus a social security supplement consisting of payments of $200 per month until the distributee reaches the age at which social security benefits of not less than $200 a month begin, the $200 supplemental payments are disregarded and, therefore, each monthly payment of $700 made before the social security age and each monthly payment of $500 made after the social security age is treated as one of a series of substantially equal periodic payments for life. A series of payments that are not substantially equal solely because the amount of each payment is reduced upon attainment of social security retirement age (or, alternatively, upon commencement of social security early retirement, survivor, or disability benefits) will also be treated as substantially equal as long as the reduction in the actual payments is level and does not exceed the applicable social security benefit.

(c) *Changes in the amount of payments or the distributee.* If the amount (or, if applicable, the method of calculating the amount) of the payments changes so that subsequent payments are not substantially equal to prior payments, a new determination must be made as to whether the remaining payments are a series of substantially equal periodic payments over a period specified in Q&A–3(b)(1) of this section. This determination is made without taking into account payments made or the years of payment that elapsed prior to the change. However, a new determination is not made merely because, upon the death of the employee, the spouse or former spouse of the employee becomes the distributee. Thus, once distributions commence over a period that is at least as long as either the first annuitant's life or 10 years (e.g., as provided by a life annuity with a five-year or ten-year-certain guarantee), then substantially equal payments to the survivor are not eligible rollover distributions even though the payment period remaining after the death of the employee is or may be less than the period described in section 402(c)(4)(A). For example, substantially equal periodic payments made under a life annuity with a five-year term certain would not be an eligible rollover distribution even when

paid after the death of the employee with three years remaining under the term certain.

(d) *Defined contribution plans.* The following rules apply in determining whether a series of payments from a defined contribution plan constitute substantially equal periodic payments for a period described in section 402(c)(4)(A):

(1) *Declining balance of years.* A series of payments from an account balance under a defined contribution plan will be considered substantially equal payments over a period if, for each year, the amount of the distribution is calculated by dividing the account balance by the number of years remaining in the period. For example, a series of payments will be considered substantially equal payments over 10 years if the series is determined as follows. In year 1, the annual payment is the account balance divided by 10; in year 2, the annual payment is the remaining account balance divided by 9; and so on until year 10 when the entire remaining balance is distributed.

(2) *Reasonable actuarial assumptions.* If an employee's account balance under a defined contribution plan is to be distributed in annual installments of a specified amount until the account balance is exhausted, then, for purposes of determining if the period of distribution is a period described in section 402(c)(4)(A), the period of years over which the installments will be distributed must be determined using reasonable actuarial assumptions. For example, if an employee has an account balance of $100,000, elects distributions of $12,000 per year until the account balance is exhausted, and the future rate of return is assumed to be 8% per year, the account balance will be exhausted in approximately 14 years. Similarly, if the same employee elects a fixed annual distribution amount and the fixed annual amount is less than or equal to $10,000, it is reasonable to assume that a future rate of return will be greater than 0% and, thus, the account will not be exhausted in less than 10 years.

(e) *Series of payments beginning before January 1, 1993.* Except as provided in paragraph (c) of this Q&A, if a series of periodic payments began before January 1, 1993, the determination of whether the post-December 31, 1992 payments are a series of substantially equal periodic payments over a specified period is made by taking into account all payments made, including payments made before January 1, 1993. For example, if a series of substantially equal periodic payments beginning on January 1, 1983, is scheduled to be paid over a period of 15 years, payments in the series that are made after December 31, 1992, will not be eligible rollover distributions even though they will continue for only five years after December 31, 1992, because the pre-January 1, 1993 payments are taken into account in determining the specified period.

Q–6: What types of variations in the amount of a payment cause the payment to be independent of a series of substantially equal periodic payments and thus not part of the series?

A–6: (a) *Independent payments.* Except as provided in paragraph (b) of this Q&A, a payment is treated as independent of the payments in a series of substantially equal payments, and thus not part of the series, if the payment is substantially larger or smaller than the other payments in the series. An independent payment is an eligible rollover distribution if it is not otherwise excepted from the definition of eligible rollover distribution. This is the case regardless of whether the payment is made before, with, or after payments in the series. For example, if an employee elects a single payment of half of the account balance with the remainder of the account balance paid over the life expectancy of the distributee, the single payment is treated as independent of the payments in the series and is an eligible rollover distribution unless otherwise excepted. Similarly, if an employee's surviving spouse receives a survivor life annuity of $1,000 per month plus a single payment on account of death of $7,500, the single payment is treated as independent of the payments in the annuity and is an eligible rollover distribution unless otherwise excepted (e.g., $5,000 of the $7,500 might qualify to be excluded from gross income as a death benefit under section 101(b)).

(b) *Special rules*—(1) *Administrative error or delay.* If, due solely to reasonable administrative error or delay in payment, there is an adjustment after the annuity starting date to the amount of any payment in a series of payments that otherwise would constitute a series of substantially equal payments described in section 402(c)(4)(A) and this section, the adjusted payment or payments will be treated as part of the series of substantially equal periodic payments and will not be treated as independent of the payments in the series. For example, if, due solely to reasonable administrative delay, the first payment of a life annuity is delayed by two months and reflects an additional two months worth of benefits, that payment will be treated as a substantially equal payment in the series rather than as an independent payment. The result will not change merely because the amount of the adjustment is paid in a separate supplemental payment.

(2) *Supplemental payments for annuitants.* A supplemental payment from a defined benefit plan to annuitants (e.g., retirees or beneficiaries) will be treated as part of a series of substantially equal payments, rather than as an independent payment, provided that the following conditions are met—

(i) The supplement is a benefit increase for annuitants;

(ii) The amount of the supplement is determined in a consistent manner for all similarly situated annuitants;

(iii) The supplement is paid to annuitants who are otherwise receiving payments that would constitute substantially equal periodic payments; and

(iv) The aggregate supplement is less than or equal to the greater of 10% of the annual rate of payment for the annuity, or $750 or any higher amount prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Federal Register. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(3) *Final payment in a series.* If a payment in a series of payments from an account balance under a defined contribution plan represents the remaining balance to the credit and is substantially less than the other payments in the series, the final payment must nevertheless be treated as a payment in the series of substantially equal payments and may not be treated as an independent payment if the other payments in the series are substantially equal and the payments are for a period described in section 402(c)(4)(A) based on the rules provided in paragraph (d)(2) of Q&A–5 of this section. Thus, such final payment will not be an eligible rollover distribution.

Q–7: When is a distribution from a plan a required minimum distribution under section 401(a)(9)?

A–7: (a) *General rule.* Except as provided in paragraphs (b) and (c) of this Q&A, if a minimum distribution is required for a calendar year, the amounts distributed during that calendar year are treated as required minimum distributions under section 401(a)(9), to the extent that the total required minimum distribution under section 401(a)(9) for the calendar year has not been satisfied. Accordingly, these amounts are not eligible rollover distributions. For example, if an employee is required under section

401(a)(9) to receive a required minimum distribution for a calendar year of $5,000 and the employee receives a total of $7,200 in that year, the first $5,000 distributed will be treated as the required minimum distribution and will not be an eligible rollover distribution and the remaining $2,200 will be an eligible rollover distribution if it otherwise qualifies. If the total section 401(a)(9) required minimum distribution for a calendar year is not distributed in that calendar year (e.g., when the distribution for the calendar year in which the employee reaches age 70½ is made on the following April 1), the amount that was required but not distributed is added to the amount required to be distributed for the next calendar year in determining the portion of any distribution in the next calendar year that is a required minimum distribution.

(b) *Distribution before age 70½.* Any amount that is paid before January 1 of the year in which the employee attains (or would have attained) age 70½ will not be treated as required under section 401(a)(9) and, thus, is an eligible rollover distribution if it otherwise qualifies.

(c) *Special rule for annuities.* In the case of annuity payments from a defined benefit plan, or under an annuity contract purchased from an insurance company (including a qualified plan distributed annuity contract (as defined in Q&A–10 of this section)), the entire amount of any such annuity payment made on or after January 1 of the year in which an employee attains (or would have attained) age 70½ will be treated as an amount required under section 401(a)(9) and, thus, will not be an eligible rollover distribution.

Q–8: How are amounts that are not includible in gross income allocated for purposes of determining the required minimum distribution?

A–8: If section 401(a)(9) has not yet been satisfied by the plan for the year with respect to an employee, a distribution is made to the employee that exceeds the amount required to satisfy section 401(a)(9) for the year for the employee, and a portion of that distribution is excludible from gross income, the following rule applies for purposes of determining the amount of the distribution that is an eligible rollover distribution. The portion of the distribution that is excludible from gross income is first allocated toward satisfaction of section 401(a)(9) and then the remaining portion of the required minimum distribution, if any, is satisfied from the portion of the distribution that is includible in gross income. For example, assume an employee is required under section 401(a)(9) to receive a minimum distribution for a calendar year of $4,000 and the employee receives a $4,800 distribution, of which $1,000 is excludible from income as a return of basis. First, the $1,000 return of basis is allocated toward satisfying the required minimum distribution. Then, the remaining $3,000 of the required minimum distribution is satisfied from the $3,800 of the distribution that is includible in gross income, so that the remaining balance of the distribution, $800, is an eligible rollover distribution if it otherwise qualifies.

Q–9: What is a distribution of a plan loan offset amount, and is it an eligible rollover distribution?

A–9: (a) *General rule.* A distribution of a plan loan offset amount, as defined in paragraph (b) of this Q&A, is an eligible rollover distribution if it satisfies Q&A–3 of this section. Thus, an amount equal to the plan loan offset amount can be rolled over by the employee (or spousal distributee) to an eligible retirement plan within the 60-day period under section 402(c)(3), unless the plan loan offset amount fails to be an eligible rollover distribution for another reason. See § 1.401(a)(31)–1, Q&A–15 for guidance concerning the offering of a direct rollover of a plan loan offset amount. See § 31.3405(c)–1, Q&A–11 of this chapter for guidance concerning special withholding rules with respect to plan loan offset amounts.

(b) *Definition of plan loan offset amount.* For purposes of section 402(c), a distribution of a plan loan offset amount is a distribution that occurs when, under the plan terms governing a plan loan, the participant's accrued benefit is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in a participant's accrued benefit). A distribution of a plan loan offset amount can occur in a variety of circumstances, e.g., where the terms governing a plan loan require that, in the event of the employee's termination of employment or request for a distribution, the loan be repaid immediately or treated as in default. A distribution of a plan loan offset amount also occurs when, under the terms governing the plan loan, the loan is cancelled, accelerated, or treated as if it were in default (e.g., where the plan treats a loan as in default upon an employee's termination of employment or within a specified period thereafter). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under section 72(p).

(c) *Examples.* The rules with respect to a plan loan offset amount in this Q&A–9, § 1.401(a)(31)–1, Q&A–15 and § 31.3405(c)–1, Q&A–11 of this chapter are illustrated by the following examples:

Example 1. (a) In 1996, Employee A has an account balance of $10,000 in Plan Y, of which $3,000 is invested in a plan loan to Employee A that is secured by Employee A's account balance in Plan Y. Employee A has made no after-tax employee contributions to Plan Y. Plan Y does not provide any direct rollover option with respect to plan loans. Upon termination of employment in 1996, Employee A, who is under age 70½ , elects a distribution of Employee A's entire account balance in Plan Y, and Employee A's outstanding loan is offset against the account balance on distribution. Employee A elects a direct rollover of the distribution.

(b) In order to satisfy section 401(a)(31), Plan Y must pay $7,000 directly to the eligible retirement plan chosen by Employee A in a direct rollover. When Employee A's account balance was offset by the amount of the $3,000 unpaid loan balance, Employee A received a plan loan offset amount (equivalent to $3,000) that is an eligible rollover distribution. However, under § 1.401(a)(31)–1, Q&A–15 Plan Y satisfies section 401(a)(31), even though a direct rollover option was not provided with respect to the $3,000 plan loan offset amount.

(c) No withholding is required under section 3405(c) on account of the distribution of the $3,000 plan loan offset amount because no cash or other property (other than the plan loan offset amount) is received by Employee A from which to satisfy the withholding. Employee A may roll over $3,000 to an eligible retirement plan within the 60 day period provided in section 402(c)(3).

Example 2. (a) The facts are the same as in *Example 1*, except that the terms governing the plan loan to Employee A provide that, upon termination of employment, Employee A's account balance is automatically offset by the amount of any unpaid loan balance to repay the loan. Employee A terminates employment but does not request a distribution from Plan Y. Nevertheless, pursuant to the terms governing the plan loan, Employee A's account balance is automatically offset by the amount of the $3,000 unpaid loan balance.

(b) The $3,000 plan loan offset amount attributable to the plan loan in this example is treated in the same manner as the $3,000 plan loan offset amount in *Example 1*.

Example 3. (a) The facts are the same as in *Example 2*, except that, instead of providing for an automatic offset upon termination of employment to repay the plan loan, the terms governing the plan loan require full repayment of the loan by Employee A within 30 days of termination of employment. Employee A terminates employment, does not elect a distribution from Plan Y, and also fails to repay the plan loan within 30 days. The plan administrator of Plan Y declares the plan loan to Employee A in default and executes on the loan by offsetting Employee A's account balance by the amount of the $3,000 unpaid loan balance.

(b) The $3,000 plan loan offset amount attributable to the plan loan in this example is treated in the same manner as the $3,000 plan loan offset amount in *Example 1* and in *Example 2*. The result in this *Example 3* is the same even though the plan administrator treats the loan as in default before offsetting Employee A's accrued benefit by the amount of the unpaid loan.

Example 4. (a) The facts are the same as in *Example 1,* except that Employee A elects to receive the distribution of the account balance that remains after the $3,000 offset to repay the plan loan, instead of electing a direct rollover of the remaining account balance.

(b) In this case, the amount of the distribution received by Employee A is $10,000, not $3,000. Because the amount of the $3,000 offset attributable to the loan is included in determining the amount that equals 20 percent of the eligible rollover distribution received by Employee A, withholding in the amount of $2,000 (20 percent of $10,000) is required under section 3405(c). The $2,000 is required to be withheld from the $7,000 to be distributed to Employee A in cash, so that Employee A actually receives a check for $5,000.

Example 5. The facts are the same as in *Example* 4, except that the $7,000 distribution to Employee A after the offset to repay the loan consists solely of employer securities within the meaning of section 402(e)(4)(E). In this case, no withholding is required under section 3405(c) because the distribution consists solely of the $3,000 plan loan offset amount and the $7,000 distribution of employer securities. This is the result because the total amount required to be withheld does not exceed the sum of the cash and the fair market value of other property distributed, excluding plan loan offset amounts and employer securities. Employee A may roll over the employer securities and $3,000 to an eligible retirement plan within the 60-day period provided in section 402(c)(3).

Example 6. Employee B, who is age 40, has an account balance in Plan Z, a profit sharing plan qualified under section 401(a) that includes a qualified cash or deferred arrangement described in section 401(k). Plan Z provides for no after-tax employee contributions. In 1990, Employee B receives a loan from Plan Z, the terms of which satisfy section 72(p)(2), and which is secured by elective contributions subject to the distribution restrictions in section 401(k)(2)(B). In 1996, the loan fails to satisfy section 72(p)(2) because Employee B stops repayment. In that year, pursuant to section 72(p), Employee B is taxed on a deemed distribution equal to the amount of the unpaid loan balance. Under Q&A–4 of this section, the deemed distribution is not an eligible rollover distribution. Because Employee B has not separated from service or experienced any other event that permits the distribution under section 401(k)(2)(B) of the elective contributions that secure the loan, Plan Z is prohibited from executing on the loan. Accordingly, Employee B's account balance is not offset by the amount of the unpaid loan balance at the time Employee B stops repayment on the loan. Thus, there is no distribution of an offset amount that is an eligible rollover distribution in 1996.

Q–10: What is a qualified plan distributed annuity contract, and is an amount paid under such a contract a distribution of the balance to the credit of the employee in a qualified plan for purposes of section 402(c)?

A–10: (a) *Definition of a qualified plan distributed annuity contract.* A qualified plan distributed annuity contract is an annuity contract purchased for a participant, and distributed to the participant, by a qualified plan.

(b) *Treatment of amounts paid as eligible rollover distributions.* Amounts paid under a qualified plan distributed annuity contract are payments of the balance to the credit of the employee for purposes of section 402(c) and are eligible rollover distributions, if they otherwise qualify. Thus, for example, if the employee surrenders the contract for a single sum payment of its cash surrender value, the payment would be an eligible rollover distribution to the extent it is includible in gross income and not a required minimum distribution under section 401(a)(9). This rule applies even if the annuity contract is distributed in connection with a plan termination. See § 1.401(a)(31)–1, Q&A–16 and § 31.3405(c)–1, Q&A–13 of this chapter concerning the direct rollover requirements and 20-percent withholding requirements, respectively, that apply to eligible rollover distributions from such an annuity contract.

Q–11: If an eligible rollover distribution is paid to an employee, and the employee contributes all or part of the eligible rollover distribution to an eligible retirement plan within 60 days, is the amount contributed not currently includible in gross income?

A–11: Yes, the amount contributed is not currently includible in gross income, provided that it is contributed to the eligible retirement plan no later than the 60th day following the day on which the employee received the distribution. If more than one distribution is received by an employee from a qualified plan during a taxable year, the 60-day rule applies separately to each distribution. Because the amount withheld as income tax under section 3405(c) is considered an amount distributed under section 402(c), an amount equal to all or any portion of the amount withheld can be contributed as a rollover to an eligible retirement plan within the 60-day period, in addition to the net amount of the eligible rollover distribution actually received by the employee. However, if all or any portion of an amount equal to the amount withheld is not contributed as a rollover, it is included in the employee's gross income to the extent required under section 402(a), and also may be subject to the 10-percent additional income tax under section 72(t).

Q–12: How does section 402(c) apply to a distributee who is not the employee?

A–12: (a) *Spousal distributee.* If any distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) applies to the distribution in the same manner as if the spouse were the employee. The same rule applies if any distribution attributable to an employee is paid in accordance with a qualified domestic relations order (as defined in section 414(p)) to the employee's spouse or former spouse who is an alternate payee. Therefore, a distribution to the surviving spouse of an employee (or to a spouse or former spouse who is an alternate payee under a qualified domestic relations order), including a distribution of ancillary death benefits attributable to the employee, is an eligible rollover distribution if it meets the requirements of section 402(c)(2) and (4) and Q&A–3 through Q&A–10 and Q&A–14 of this section. However, a qualified plan (as defined in Q&A–2 of this section) is not treated as an eligible retirement plan with respect to a surviving spouse. Only an individual retirement plan is treated as an eligible retirement plan with respect to an eligible rollover distribution to a surviving spouse.

(b) *Non-spousal distributee.* A distributee other than the employee or the employee's surviving spouse (or a spouse or former spouse who is an alternate payee under a qualified domestic relations order) is not permitted to roll over distributions from a qualified plan. Therefore, those distributions do not constitute eligible rollover distributions under section 402(c)(4) and are not subject to the 20-percent income tax withholding under section 3405(c).

Q–13: Must an employee's (or spousal distributee's) election to treat a contribution of an eligible rollover distribution to an individual retirement plan as a rollover contribution be irrevocable?

A–13: (a) *In general.* Yes. In order for a contribution of an eligible rollover distribution to an individual retirement plan to constitute a rollover and, thus, to qualify for current exclusion from gross income, a distributee must elect, at the time the contribution is made, to treat the contribution as a rollover

contribution. An election is made by designating to the trustee, issuer, or custodian of the eligible retirement plan that the contribution is a rollover contribution. This election is irrevocable. Once any portion of an eligible rollover distribution has been contributed to an individual retirement plan and designated as a rollover distribution, taxation of the withdrawal of the contribution from the individual retirement plan is determined under section 408(d) rather than under section 402 or 403. Therefore, the eligible rollover distribution is not eligible for capital gains treatment, five-year or ten-year averaging, or the exclusion from gross income for net unrealized appreciation on employer stock.

(b) Direct rollover. If an eligible rollover distribution is paid to an individual retirement plan in a direct rollover at the election of the distributee, the distributee is deemed to have irrevocably designated that the direct rollover is a rollover contribution.

Q–14: How is the $5,000 death benefit exclusion under section 101(b) treated for purposes of determining the amount that is an eligible rollover distribution?

A–14: To the extent that a death benefit is a distribution from a qualified plan, the portion of the distribution that is excluded from gross income under section 101(b) is not an eligible rollover distribution. See § 1.401(a)(31)-1, Q&A–17 for guidance concerning assumptions that a plan administrator may make with respect to whether and to what extent a distribution of a survivor benefit is excludible from gross income under section 101(b).

Q–15: May an employee (or spousal distributee) roll over more than the plan administrator determines to be an eligible rollover distribution using an assumption described in § 1.401(a)(31)-1, Q&A–17?

A–15: Yes. The portion of any distribution that an employee (or spousal distributee) may roll over as an eligible rollover distribution under section 402(c) is determined based on the actual application of section 402 and other relevant provisions of the Internal Revenue Code. The actual application of these provisions may produce different results than any assumption described in § 1.401(a)(31)–1, Q&A–17 that is used by the plan administrator. Thus, for example, even though the plan administrator calculates the portion of a distribution that is a required minimum distribution (and thus is not made eligible for direct rollover under section 401(a)(31)), by assuming that there is no designated beneficiary, the portion of the distribution that is actually a required minimum distribution and thus not an eligible rollover distribution is determined by taking into account the designated beneficiary, if any. If, by taking into account the designated beneficiary, a greater portion of the distribution is an eligible rollover distribution, the distributee may rollover the additional amount. Similarly, even though a plan administrator assumes that a distribution from a qualified plan is the only death benefit with respect to an employee that qualifies for the $5,000 death benefit exclusion under section 101(b), to the extent that the death benefit exclusion is allocated to a different death benefit, a greater portion of the distribution may actually be includible in gross income and, thus, be an eligible rollover distribution, and the surviving spouse may roll over the additional amount if it otherwise qualifies.

Q–16: Is a rollover from a qualified plan to an individual retirement account or individual retirement annuity treated as a rollover contribution for purposes of the one-year look-back rollover limitation of section 408(d)(3)(B)?

A–16: No. A distribution from a qualified plan that is rolled over to an individual retirement account or individual retirement annuity is not treated for purposes of section 408(d)(3)(B) as an amount received by an individual from an individual retirement account or individual retirement annuity which is not includible in gross income because of the application of section 408(d)(3).

§ 1.402(f)–1 Required explanation of eligible rollover distributions; questions and answers.

The following questions and answers concern the written explanation requirement imposed by section 402(f) of the Internal Revenue Code of 1986 relating to distributions eligible for rollover treatment. Section 402(f) was amended by section 521(a) of the Unemployment Compensation Amendments of 1992, Public Law 102–318, 106 Stat. 290 (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 403(b)(8) and (10), and 3405(c), see §§ 1.401(a)(31)–1, 1.402(c)–2, 1.403(b)–2, and 31.3405(c)–1 of this chapter, respectively.

List of Questions

Questions and Answers

Q–1: What are the requirements for a written explanation under section 402(f)?

A–1: (a) *General rule.* Under section 402(f), as amended by UCA, the plan administrator of a qualified plan is required, within a reasonable period of time before making an eligible rollover distribution, to provide the distributee with the written explanation described in section 402(f) (section 402(f) notice). The section 402(f) notice must be designed to be easily understood and must explain the following: the rules under which the distributee may elect that the distribution be paid in the form of a direct rollover to an eligible retirement plan; the rules that require the withholding of tax on the distribution if it is not paid in a direct rollover; the rules under which the distributee may defer tax on the distribution if it is contributed in a rollover to an eligible retirement plan within 60 days of the distribution; and if applicable, certain special rules regarding the taxation of the distribution as described in section 402(d) (averaging with respect to lump sum distributions) and (e) (other rules including treatment of net unrealized appreciation). See § 1.401(a)(31)–1, Q&A–7 for additional information that must be provided if a plan provides a default procedure regarding the election of a direct rollover.

(b) *Model section 402(f) notice.* The plan administrator will be deemed to have complied with the requirements of paragraph (a) of this Q&A–1 relating to the contents of the section 402(f) notice if the plan administrator provides the applicable model section 402(f) notice published by the Internal Revenue Service for this purpose in a revenue ruling, notice, or other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(c) *Delegation to Commissioner.* The Commissioner, in revenue rulings, notices, and other guidance, published in the Internal Revenue Bulletin, may modify, or provide any additional guidance with respect to, the notice requirement of this section. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(d) *Effective date*—(1) *Statutory effective date.* Section 402(f) applies to eligible rollover distributions made after December 31, 1992.

(2) *Regulatory effective date.* This section applies to eligible rollover distributions made on or after October

19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, § 1.402(c)–2T, Q&A–11 through 15 (as it appeared in the April 1, 1995 edition of 26 CFR part 1), apply. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, a plan administrator or payor may satisfy the requirements of section 402(f) by substituting any or all provisions of this section for the corresponding provisions of § 1.402(c)–1T, Q&A–11 through 15, if any.

Q–2: When must the plan administrator provide the section 402(f) notice to a distributee?

A–2: The plan administrator must provide a distributee with the section 402(f) notice no less than 30 days and no more than 90 days before the date of distribution. However, if the distributee, after having received the section 402(f) notice, affirmatively elects a distribution, a plan will not fail to satisfy section 402(f) merely because the distribution is made less than 30 days after the section 402(f) notice was provided to the distributee, provided that the following requirement is met. The plan administrator must provide information to the distributee clearly indicating that (in accordance with the first sentence of this Q&A–2) the distributee has a right to consider the decision of whether or not to elect a direct rollover for at least 30 days after the notice is provided. The plan administrator may use any method to inform the distributee of the relevant time period, provided that the method is reasonably designed to attract the attention of the distributee. For example, this information could be provided either in the section 402(f) notice or stated in a separate document (e.g., attached to the election form) that is provided at the same time as the notice. For purposes of satisfying the requirement in the first sentence of this Q&A–2, the plan administrator may substitute the annuity starting date, within the meaning of § 1.401(a)–20, Q&A–10, for the date of distribution.

Q–3: Must the plan administrator provide a separate section 402(f) notice for each distribution in a series of periodic payments that are eligible rollover distributions?

A–3: No. In the case of a series of periodic payments that are eligible rollover distributions, the plan administrator is permitted to satisfy section 402(f) with respect to each payment in the series by providing the section 402(f) notice prior to the first payment in the series, in accordance with the rules in Q&A–1 and Q&A–2 of this section, and providing the notice at least once annually for as long as the payments continue. However, see § 1.401(a)(31)–1, Q&A–12 for additional guidance if the plan administrator intends to treat a distributee's election to make or not make a direct rollover with respect to one payment in a series of periodic payments as applicable to all subsequent payments in the series (absent a subsequent change of election).

Q–4: May a plan administrator post the section 402(f) notice as a means of providing it to distributees?

A–4: No. The posting of the section 402(f) notice will not be considered provision of the notice. The written notice must be provided individually to any distributee of an eligible rollover distribution within the time period described in Q&A–2 and Q&A–3 of this section.

§ 1.403(b)–2 Eligible rollover distributions; questions and answers.

The following questions and answers relate to eligible rollover distributions from annuities, custodial accounts, and retirement income accounts described in section 403(b) of the Internal Revenue Code of 1986, as amended by sections 521 and 522 of the Unemployment Compensation Amendments of 1992 (Public Law 102–318, 106 Stat. 290) (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 402(f), and 3405(c), see §§ 1.401(a)(31)–1, 1.402(c)–2, 1.402(f)–1, and § 31.3405(c)–1 of this chapter, respectively.

List of Questions

Questions and Answers

Q–1: What is the rule regarding distributions that may be rolled over to an eligible retirement plan from annuities, custodial accounts, and retirement income accounts described in section 403(b)?

A–1: Under section 403(b)(8), as amended by UCA, any eligible rollover distribution from a section 403(b) annuity is permitted to be rolled over to an eligible retirement plan. For purposes of this section, a section 403(b) annuity includes an annuity contract, a custodial account, and a retirement income account described in section 403(b). For purposes of section 403(b)(8) and this section, an eligible retirement plan means another section 403(b) annuity or an individual retirement plan (as defined in § 1.402(c)(2), Q&A–2 but does not include a qualified plan (as defined in § 1.402(c)–2), Q&A–2. Except to the extent otherwise provided in this section, an eligible rollover distribution from a section 403(b) annuity is an eligible rollover distribution described in section 402(c) (2) and (4) and § 1.402(c)–2, Q&A–3 through Q&A–10 and Q&A–14, except that the distribution is from section 403(b) annuity rather than a qualified plan. Thus, for example, to the extent that corrective distributions described in § 1.402(c)–2, Q&A–4 are properly made from a section 403(b) annuity, such distributions are not eligible rollover distributions. Similarly, in the case of annuity distributions from an annuity contract described in section 403(b), the entire amount of any such annuity payment made on or after January 1 of the year in which an employee attains (or would have attained) age 70½ will be treated as an amount required under section 401(a)(9) and, thus, will not be an eligible rollover distribution. The rules with respect to rollovers in sections 402 (c)(1), (c)(3), and (c)(9) and § 1.402(c)–2, Q&A–11 through Q&A–13 and Q&A–15 also apply to eligible rollover distributions from section 403(b) annuities.

Q–2: Is a section 403(b) annuity required to provide the direct rollover option described in section 401(a)(31) as a distribution option?

A–2: (a) *General rule.* Yes. Pursuant to section 403(b)(10), section 403(b) does not apply to an annuity contract, custodial account, or retirement income account unless the annuity contract, custodial account, or retirement income account provides that if the distributee of any eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan (as defined in Q&A–1 of this section) and specifies the eligible retirement plan to which the distribution is to be paid, then the distribution will be paid to that eligible retirement plan in a direct rollover. For purposes of determining whether a section 403(b) annuity has satisfied this direct rollover requirement, the provisions of § 1.401(a)(31)–1 apply to the section 403(b) annuity as though it were a plan qualified under section 401(a) unless otherwise provided in this section. For example, as described in § 1.401(a)(31)–

1, Q&A–14 a direct rollover from a section 403(b) annuity to another section 403(b) annuity is a distribution and a rollover and not a transfer of funds between section 403(b) annuities and, thus, is not subject to the applicable law governing transfers of funds between section 403(b) annuities. In applying the provisions of § 1.401(a)(31)–1, the payor of the eligible rollover distribution is treated as the plan administrator.

(b) *Mandatory withholding.* As in the case of an eligible rollover distribution from a qualified plan, if a distributee of an eligible rollover distribution from a section 403(b) annuity does not elect to have the eligible rollover distribution paid directly to an eligible retirement plan in a direct rollover, the eligible rollover distribution is subject to 20-percent income tax withholding imposed under section 3405(c). See § 31.3405(c)–1 of this chapter for provisions regarding the withholding requirements relating to eligible rollover distributions.

Q–3: Is the payor of a section 403(b) annuity required to provide the distributee of an eligible rollover distribution with an explanation of the direct rollover option?

A–3: Yes. In order to ensure that the distributee of an eligible rollover distribution from a section 403(b) annuity has a meaningful right to elect a direct rollover, the distributee must be informed of the option. Thus, within a reasonable time period before making an eligible rollover distribution, the payor must provide an explanation to the distributee of his or her right to elect a direct rollover and the income tax withholding consequences of not electing a direct rollover. For purposes of satisfying the reasonable time period, the qualified plan timing rule provided in § 1.402(f)–1, Q&A–2 does not apply to section 403(b) annuities. However, a payor of a section 403(b) annuity will be deemed to have provided the explanation within a reasonable time period if the payor complies with the time period in that rule.

Q–4: When do sections 403(b)(8) and (b)(10), as amended by UCA, and this § 1.403(b)–2 apply to distributions from section 403(b) annuities?

A–4: (a) *General rule*—(1) *Statutory effective date.* Section 403(b)(8), as amended by UCA, and section 403(b)(10), as amended by UCA, apply to distributions made on or after January 1, 1993. In addition, the underlying section 403(b) annuity document must be amended at the time provided in, and the section 403(b) annuity must operate in accordance with the requirements of § 1.401(a)(31)–1, Q&A–18. Section 522 of UCA provides a special effective date for governmental section 403(b) annuities. This special effective date is specified in § 1.403(b)–2T (as it appeared in the April 1, 1995 edition of 26 CFR part 1).

(2) *Regulatory effective date.* This section applies to distributions made on or after October 19, 1995. For distributions made on or after January 1, 1993 and before October 19, 1995, § 1.403(b)–2T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for distributions made on or after January 1, 1993 but before October 19, 1995, a section 403(b) annuity may satisfy section 403(b)(10) by substituting any or all provisions of this section for the corresponding provisions of § 1.403(b)–2T, if any.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Par. 4. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Par. 5. Section 31.3402(p)–1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 31.3402(p)–1 Voluntary withholding agreements.

(a) * * * See § 31.3405(c)–1, Q&A–3 concerning agreements to have more than 20-percent Federal income tax withheld from eligible rollover distributions within the meaning of section 402.

* * * * *

Par. 6. Section 31.3405(c)–1 is added to read as follows:

§ 31.3405(c)–1 Withholding on eligible rollover distributions; questions and answers.

The following questions and answers relate to withholding on eligible rollover distributions under section 3405(c) of the Internal Revenue Code of 1986, as added by section 522(b) of the Unemployment Compensation Amendments of 1992 (Public Law 102–318, 106 Stat. 290) (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 402(f), and 403(b)(8) and (10), see §§ 1.401(a)(31)–1, 1.402(c)–2, 1.402(f)–1, and 1.403(b)–2 of this chapter, respectively.

List of Questions

Questions and Answers

Q–1: What are the withholding requirements under section 3405 for distributions from qualified plans and section 403(b) annuities?

A–1: (a) *General rule.* Section 3405(c), added by UCA, provides that any designated distribution that is an

eligible rollover distribution (as defined in section 402(f)(2)(A)) from a qualified plan or a section 403(b) annuity is subject to income tax withholding at the rate of 20 percent unless the distributee of the eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan in a direct rollover. See § 1.402(c)–2, Q&A–2 of this chapter for the definition of a qualified plan and § 1.403(b)–2, Q&A–1 of this chapter for the definition of a section 403(b) annuity. For purposes of section 3405 and this section, with respect to a distribution from a qualified plan, an eligible retirement plan is a trust qualified under section 401(a), an annuity plan described in section 403(a), or an individual retirement plan (as described in § 1.402(c)–2, Q&A–2 of this chapter). For purposes of section 3405 and this section, with respect to a distribution from a section 403(b) annuity, an eligible retirement plan is an annuity contract, a custodial account, a retirement income account described in section 403(b), or an individual retirement plan. If a designated distribution is not an eligible rollover distribution, it is subject to the elective withholding provisions of section 3405(a) and (b) and § 35.3405–1 of this chapter and is not subject to the mandatory withholding provisions of section 3405(c) and this section.

(b) *Application of other statutory provisions.* See § 1.401(a)(31)–1 of this chapter concerning the requirements and the procedures for electing a direct rollover under section 401(a)(31). See section 402(c)(2) and (4), and § 1.402(c)–2, Q&A–3 through Q&A–10 and Q&A–14 of this chapter for rules to determine what constitutes an eligible rollover distribution. See § 1.402(f)–1, Q&A–1 through Q&A–3 and § 1.403(b)–2, Q&A–3 of this chapter concerning the notice that must be provided to a distributee, within a reasonable period of time before making an eligible rollover distribution. See § 1.403(b)–2, Q&A–1 and Q&A–2 of this chapter for guidance concerning the rollover provisions and direct rollover requirements for distributions from annuities described in section 403(b).

(c) *Effective date*—(1) *Statutory effective date*—(i) *General rule.* Section 3405(c), as added by UCA, applies to eligible rollover distributions made on or after January 1, 1993, even if the employee's employment with the employer maintaining the plan terminated before January 1, 1993 and even if the eligible rollover distribution is part of a series of payments that began before January 1, 1993.

(ii) *Special rule for governmental section 403(b) annuities.* Section 522 of UCA provides a special effective date for governmental section 403(b) annuities. This special effective date appears in § 1.403(b)–2T of this chapter (as it appeared in the April 1, 1995 edition of 26 CFR part 1).

(2) *Regulatory effective date.* This section applies to eligible rollover distributions made on or after October 19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, § 31.3405(c)–1T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, a plan administrator or payor may comply with the withholding requirements of section 3405(c) by substituting any or all provisions of this section for the corresponding provisions of § 31.3405(c)–1T, if any.

Q–2: May a distributee elect under section 3405(c) not to have Federal income tax withheld from an eligible rollover distribution?

A–2: No. The 20-percent income tax withholding imposed under section 3405(c)(1) applies to an eligible rollover distribution unless the distributee elects under section 401(a)(31) to have the eligible rollover distribution paid directly to an eligible retirement plan in a direct rollover. See § 1.401(a)(31)–1 and § 1.403(b)–2, Q&A–2 of this chapter for provisions concerning the requirement that a distributee of an eligible rollover distribution be permitted to elect a distribution in the form of a direct rollover.

Q–3: May a distributee be permitted to elect to have more than 20-percent Federal income tax withheld from an eligible rollover distribution?

A–3: Yes. Under section 3402(p), a distributee of an eligible rollover distribution and the plan administrator or payor are permitted to enter into an agreement to provide for withholding in excess of 20 percent from an eligible rollover distribution. Any agreement must be made in accordance with applicable forms and instructions. However, no request for withholding will be effective between the plan administrator or payor and the distributee until the plan administrator or payor accepts the request by commencing to withhold from the amounts with respect to which the request was made. An agreement under section 3402(p) shall be effective for such period as the plan administrator or payor and the distributee mutually agree upon. However, either party to the agreement may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other.

Q–4: Who has responsibility for complying with section 3405(c) relating to the 20-percent income tax withholding on eligible rollover distributions?

A–4: Section 3405(d) generally requires the plan administrator of a qualified plan and the payor of a section 403(b) annuity to withhold under section 3405(c)(1) an amount equal to 20 percent of the portion of an eligible rollover distribution that the distributee does not elect to have paid in a direct rollover. When an amount is paid under a qualified plan distributed annuity contract as defined in § 1.402(c)–2, Q&A–10 of this chapter, the payor is treated as the plan administrator. See Q&A–13 of this section concerning eligible rollover distributions from a qualified plan distributed annuity contract.

Q–5: May the plan administrator shift the withholding responsibility to the payor and, if so, how?

A–5: Yes. The plan administrator may shift the withholding responsibility to the payor by following the procedures set forth in § 35.3405–1, Q&A E–2 through E–5 of this chapter (relating to elective withholding on pensions, annuities and certain other deferred income) with appropriate adjustments, including the plan administrator's identification of amounts that constitute required minimum distributions.

Q–6: How does the 20-percent withholding requirement under section 3405(c) apply if a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

A–6: If a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to receive the remainder of the distribution, the 20-percent withholding requirement under section 3405(c) applies only to the portion of the eligible rollover distribution that the distributee receives and not to the portion that is paid in a direct rollover.

Q–7: Will the plan administrator be subject to liability for tax, interest, or penalties for failure to withhold 20 percent from an eligible rollover distribution that, because of erroneous information provided by a distributee, is not paid to an eligible retirement plan even though the distributee elected a direct rollover?

A–7: (a) *General rule.* If the plan administrator reasonably relied on adequate information provided by the

distributee (as described in paragraph (b) of this Q&A), the plan administrator will not be subject to liability for taxes, interest, or penalties for failure to withhold income tax from an eligible rollover distribution solely because the distribution is paid to an account or plan that is not an eligible retirement plan (as defined, with respect to distributions from qualified plans, in section 402(c)(8)(B) and § 1.402(c)–2, Q&A–2 of this chapter and, with respect to a distributions from section 403(b) annuities, in § 1.403(b)–2), Q&A–1 of this chapter. Although the plan administrator is not required to verify independently the accuracy of information provided by the distributee, the plan administrator's reliance on the information furnished must be reasonable. For example, it is not reasonable for the plan administrator to rely on information that is clearly erroneous on its face.

(b) *Adequate information.* The plan administrator has obtained from the distributee adequate information on which to rely in making a direct rollover if the distributee furnishes to the plan administrator: the name of the eligible retirement plan; a representation that the recipient plan is an individual retirement plan, a qualified plan, or a section 403(b) annuity, as appropriate; and any other information that is necessary in order to permit the plan administrator to accomplish the direct rollover by the means it has selected. This information must include any information needed to comply with the specific requirements of § 1.401(a)(31)–1, Q&A–3 and Q&A–4 of this chapter. For example, if the direct rollover is to be made by mailing a check to the trustee of an individual retirement account, the plan administrator must obtain, in addition to the name of the individual retirement account and the representation described above, the name and address of the trustee of the individual retirement account.

Q–8: Is an eligible rollover distribution that is paid to a qualified defined benefit plan subject to 20-percent withholding?

A–8: No. If an eligible rollover distribution is paid in a direct rollover to an eligible retirement plan within the meaning of section 402(c)(8), including a qualified defined benefit plan, it is reasonable to believe that the distribution is not includible in gross income pursuant to section 402(c)(1). Accordingly, pursuant to section 3405(e)(1)(B), the distribution is not a designated distribution and is not subject to 20-percent withholding.

Q–9: If property other than cash, employer securities, or plan loans is distributed, how is the 20-percent income tax withholding required under section 3405(c) accomplished?

A–9: When all or a portion of an eligible rollover distribution subject to 20-percent income tax withholding under section 3405(c) consists of property other than cash, employer securities, or plan loan offset amounts, the plan administrator or payor must apply § 35.3405–1, Q&A F–2 of this chapter and may apply § 35.3405–1, Q&A F–3 of this chapter in determining how to satisfy the withholding requirements.

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?

A–10: (a) *In general.* For purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding, a plan administrator may make the assumptions described in paragraphs (b), (c), and (d) of this Q&A in determining the amount of a distribution that is an eligible rollover distribution and a designated distribution. Q&A–17 of § 1.401(a)(31)–1 of this chapter provides assumptions for purposes of complying with section 401(a)(31). See § 1.402(c)–2, Q&A–15 of this chapter concerning the effect of these assumptions for purposes of section 402(c).

(b) *$5,000 death benefit.* A plan administrator may assume that a distribution that qualifies for the $5,000 death benefit exclusion under section 101(b) is the only death benefit being paid with respect to a deceased employee that qualifies for that exclusion. Thus, in such a case, the plan administrator may assume that the distribution is not an eligible rollover distribution to the extent that it would be excludible from gross income based on this assumption.

(c) *Required minimum distributions.* The plan administrator is permitted to determine the amount of the minimum distribution required to satisfy section 401(a)(9)(A) for any calendar year by assuming that there is no designated beneficiary.

(d) *Valuation of property.* In the case of a distribution that includes property, in calculating the amount of the distribution for purposes of applying section 3405(c), the value of the property may be determined in accordance with § 35.3405–1, Q&A F–1 of this chapter.

Q–11: Are there special rules for applying the 20-percent withholding requirement to employer securities and a plan loan offset amount distributed in an eligible rollover distribution?

A–11: Yes. The maximum amount to be withheld on any designated distribution (including any eligible rollover distribution) under section 3405(c) must not exceed the sum of the cash and the fair market value of property (excluding employer securities) received in the distribution. The amount of the sum is determined without regard to whether any portion of the cash or property is a designated distribution or an eligible rollover distribution. For purposes of this rule, any plan loan offset amount, as defined in § 1.402(c)–2, Q&A–9 of this chapter, is treated in the same manner as employer securities. Thus, although employer securities and plan loan offset amounts must be included in the amount that is multiplied by 20-percent, the total amount required to be withheld for an eligible rollover distribution is limited to the sum of the cash and the fair market value of property received by the distributee, excluding any amount of the distribution that is a plan loan offset amount or that is distributed in the form of employer securities. For example, if the only portion of an eligible rollover distribution that is not paid in a direct rollover consists of employer securities or a plan loan offset amount, withholding is not required. In addition, if a distribution consists solely of employer securities and cash (not in excess of $200) in lieu of fractional shares, no amount is required to be withheld as income tax from the distribution under section 3405 (including section 3405(c) and this section). For purposes of section 3405 and this section, employer securities means securities of the employer corporation within the meaning of section 402(e)(4)(E)(ii).

Q–12: How does the mandatory withholding rule apply to net unrealized appreciation from employer securities?

A–12: An eligible rollover distribution can include net unrealized appreciation from employer securities, within the meaning of section 402(e)(4), even if the net unrealized appreciation is excluded from gross income under section 402(e)(4). However, to the extent that it is excludable from gross income pursuant to section 402(e)(4), net unrealized appreciation is not a designated distribution pursuant to section 3405(e)(1)(B) because it is reasonable to believe that it is not includable in gross income. Thus, to the extent that net unrealized appreciation is excludable from gross income pursuant to section 402(e)(4), net

unrealized appreciation is not included in the amount of an eligible rollover distribution that is subject to 20-percent withholding.

Q–13: Does the 20-percent withholding requirement apply to eligible rollover distributions from a qualified plan distributed annuity contract?

A–13: The 20-percent withholding requirement applies to eligible rollover distributions from a qualified plan distributed annuity contract as defined in Q&A–10 of § 1.402(c)–2 of this chapter. In the case of an eligible rollover distribution from such an annuity contract, the payor is treated as the plan administrator for purposes of section 3405. See § 1.401(a)(31)–1, Q&A–16 of this chapter concerning the direct rollover requirements that apply to distributions from such an annuity contract and see § 1.402(c)–2, Q&A–10 of this chapter concerning the treatment of distributions from such annuity contracts as eligible rollover distributions.

Q–14: Must a payor or plan administrator withhold tax from an eligible rollover distribution for which a direct rollover election was not made if the amount of the distribution is less than $200?

A–14: No. However, all eligible rollover distributions received within one taxable year of the distributee under the same plan must be aggregated for purposes of determining whether the $200 floor is reached. If the plan administrator or payor does not know at the time of the first distribution (that is less than $200) whether there will be additional eligible rollover distributions during the year for which aggregation is required, the plan administrator need not withhold from the first distribution. If distributions are made within one taxable year under more than one plan of an employer, the plan administrator or payor may, but need not, aggregate distributions for purposes of determining whether the $200 floor is reached. However, once the $200 threshold has been reached, the sum of all payments during the year must be used to determine the applicable amount to be withheld from subsequent payments during the year.

Q–15: If eligible rollover distributions are made from a qualified plan, who has responsibility for making the returns and reports required under these regulations?

A–15: Generally, the plan administrator, as defined in section 414(g), is responsible for maintaining the records and making the required reports with respect to eligible rollover distributions from qualified plans. However, if the plan administrator fails to keep the required records and make the required reports, the employer maintaining the plan is responsible for the reports and returns.

Q–16: What eligible rollover distributions must be reported on Form 1099–R?

A–16: Each eligible rollover distribution, including each eligible rollover distribution that is paid directly to an eligible retirement plan in a direct rollover, must be reported on Form 1099–R in accordance with the instructions for Form 1099–R. For purposes of the reporting required under section 6047(e), a direct rollover is treated as a distribution that is immediately rolled over to an eligible retirement plan. Distributions that are not eligible rollover distributions are subject to the reporting requirements set forth in § 35.3405–1 of this chapter and applicable forms and instructions.

Q–17: Must the plan administrator, trustee or custodian of the eligible retirement plan report amounts received in a direct rollover?

A–17: (a) *Individual retirement plan.* If a distributee elects to have an eligible rollover distribution paid to an individual retirement plan in a direct rollover, the eligible rollover distribution is reported on Form 5498 as a rollover contribution to the individual retirement plan, in accordance with the instructions for Form 5498.

(b) *Qualified plan or section 403(b) annuity.* If a distributee elects to have an eligible rollover distribution paid to a qualified plan or section 403(b) annuity, the recipient plan or annuity is not required to report the receipt of the rollover contribution.

§ 31.3405(c)–1T [Removed]

Par. 7. Section 31.3405(c)–1T is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 9. In § 602.101, paragraph (c) is amended as follows:

1. Removing the following entries from the table:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.401(a)(31)–1T	1545–1341
* * * * *	
1.402(c)–2T	1545–1341
* * * * *	
1.402(f)–2T	1545–1341
* * * * *	
1.403(b)–2T	1545–1341
* * * * *	
31.3405(c)–1T	1545–1341
* * * * *	

2. Revising the entry for 1.402(f)–1 and adding entries to the table in numerical order to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.401(a)(31)–1	1545–1341
* * * * *	
1.402(c)–2	1545–1341
* * * * *	
1.402(f)–1	1545–1341
* * * * *	
1.403(b)–2	1545–1341
* * * * *	
31.3405(c)–1	1545–1341
* * * * *	

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: August 29, 1995.

Cynthia G. Beerbower,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 95–23265 Filed 9–15–95; 4:00 pm]

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26 CFR Parts 1 and 602

[TD 8620]

RIN 1545–AT75

Notice, Consent, and Election Requirements of Sections 411(a)(11) and 417

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.